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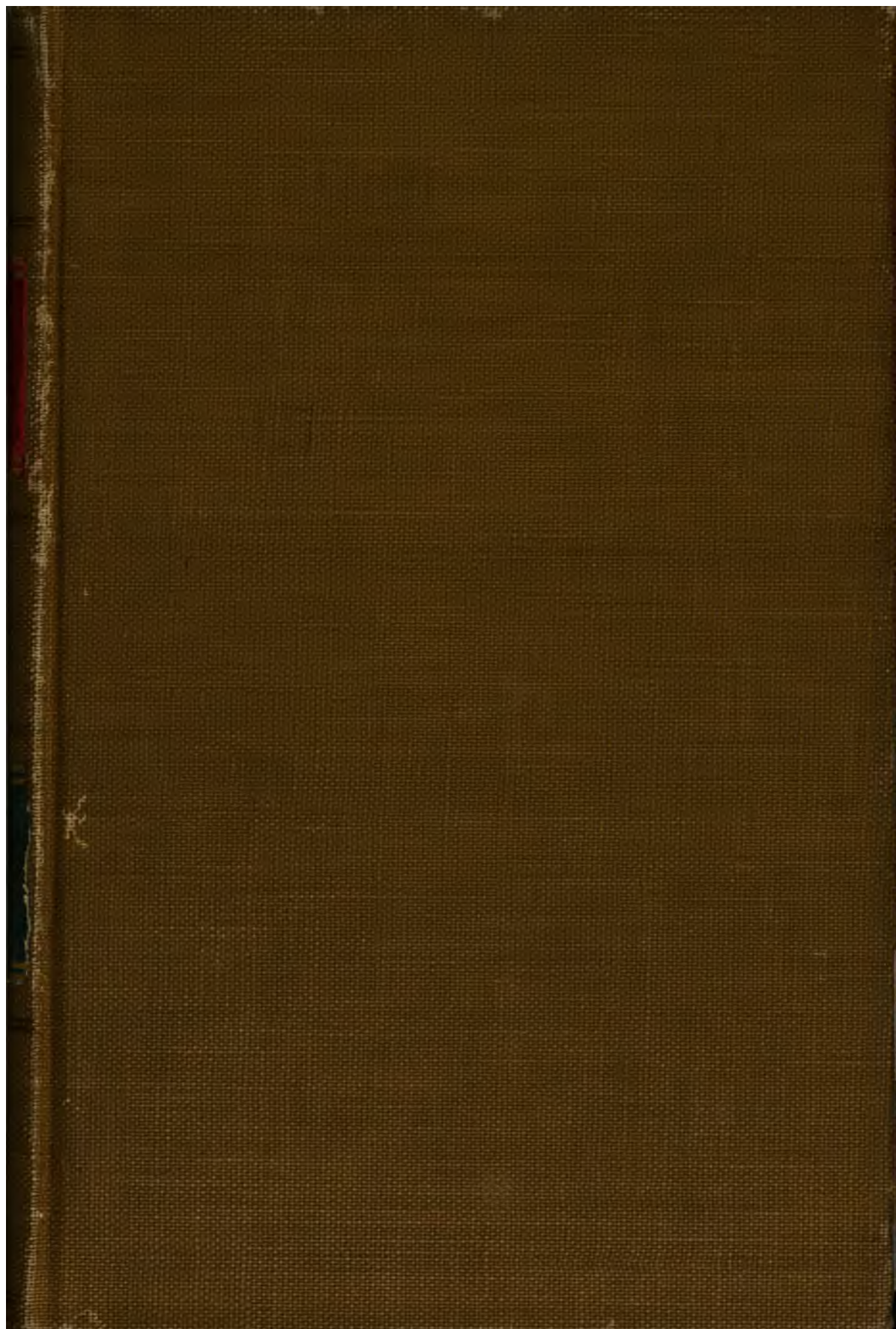
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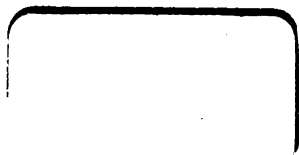
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AF
AT
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ABRIDGMENT
OF
ELEMENTARY LAW

EMBODYING THE
GENERAL PRINCIPLES, RULES, AND DEFINITIONS OF LAW
TOGETHER WITH THE COMMON MAXIMS AND
RULES OF EQUITY JURISPRUDENCE,

EMBRACING THE SUBJECTS CONTAINED IN
A REGULAR LAW COURSE,

COLLECTED AND ARRANGED SO AS TO BE
EASILY ACQUIRED BY STUDENTS, COMPREHENDED BY
JUSTICES, AND READILY REVIEWED BY
YOUNG PRACTITIONERS.

By M. E. DUNLAP,
COUNSELLOR AT LAW.

REVISED BY T. F. CHAPLIN.

THIRD EDITION.

ST. LOUIS:

THE F. H. THOMAS LAW BOOK CO.

1905.

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PRESS OF NIXON-JONES PRINTING CO.

PREFACE TO REVISED EDITION.

Since the last edition of Dunlap's Abridgment of Elementary Law appeared, it has become apparent that the book might be made even more valuable to both the law student and the practicing lawyer by certain changes. It has been deemed best to separate and treat the subjects of agency, partnership, commercial paper and sales under separate heads, and to enlarge the treatment of them. By reason of these changes, the book as now presented to the public covers the entire field of Elementary Law, and it is hoped will commend itself to both the law student and the practicing lawyer who desires to obtain in small compass the elementary principles of the various departments of the law.

How well the book accomplishes this purpose may be seen by comparison of it with what the Supreme Court of Texas has recently set forth as the proper course of study and regulation governing the mode of examinations for admissions to the Bar in that State. The requirements in Texas are very similar to the requirements for admission in other jurisdictions. The requirements in Texas comprise the following divisions: first, the elements of the common law, and more particularly Blackstone's Commentaries, volumes 1, 2 and 3; second, real property; third, contracts, and under this division, first, the elements of contracts; second, sales, bills and notes; third, carriers, partnerships, corporations and agencies; fourth, torts; fifth, equity jurisprudence; sixth, pleading, practice and evidence; seventh, domestic relations and administrations of decedents' estates; eighth, constitutional and statutory law; and, ninth, criminal law, and particularly the fourth volume of Blackstone.

An examination of the table of contents of the present edition of Dunlap's Abridgment of Elementary Law will show that all of these subjects with the possible exception of the

constitutional law, have been handled in this book. So far as constitutional law goes, this edition contains a copy of the Constitution of the United States, and it would be impossible within the limited scope of a work of this character to treat this subject at greater length.

The subjects of real property and criminal law are not treated separately, but will be found in the abridgment of Blackstone, real property in the second volume of Blackstone, and criminal law in the fourth. There is no lawyer who has read the text-books on real property with care, and is familiar with Blackstone, but what will recognize that the fountain head of the law of real property is Blackstone's treatment of it in the second volume of his Commentaries, and that the modern text-books are but treatises based upon Blackstone with the modern developments of the law on the subject. In the present edition of Dunlap the changes introduced in the law of real property have been treated in notes appended to the abridgment of the second volume of Blackstone's Commentaries.

T. F. CHAPLIN.

St. Louis, Mo., February 1, 1905.

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PREFACE.

When Mr. Wilberforce asked the advice of Lord Eldon as to the course to be pursued by the young Grants in their legal studies, the advice was, "to live the life of a hermit and work like a horse." That has been, and no doubt still is, sound advice in England to make a great lawyer; and in some measure it is, and perhaps will be more so, in the United States. But we are a different race of people, or, rather, a like race under different circumstances. The labor of the profession is not divided here as it is in England, and probably never will be; the consequence is, that to make a great lawyer one may have much less learned lore, and must have much more knowledge of men and things in general.

There is no spot on the earth where the legal profession calls for such varied and extensive acquirements as it does in this country. A lawyer here, to be eminent, ought to know everything which can be known, for there is no kind of knowledge that he may not be required to bring into use. With these facts in view, this volume has been prepared to aid the student in the thorough mastery of his course of *legal studies*, and, to some extent, obviate the loss of time during his final preparation for admission to the bar; also, to give him some practical hints touching the best methods of acquiring a knowledge of the law and its practice. * * * The chief design of this work is to give in the fewest pages the principles and definitions of law and equity, to furnish a review or note book and *vade mecum* for LAW STUDENTS and young practi-

tioners. It is said that "the substance of any science consists of certain elementary rules or first principles, which, as they are generally the pure dictates of reason, and short and simple in their phraseology, find an easy access to the mind. These rules are necessarily numerous, and, with their exceptions, constitute the entire learning of any science." Principles, owing to the universality of their expression, their reason and application, glide almost imperceptibly into the mind, and, once seated in the memory, seldom or never abandon it. That which is forcibly impressed on the understanding, because fully comprehended, is not liable to forsake us; hence those rules which have been repeatedly tested by reason, and successfully applied to an infinite variety of cases, and finally adopted as principles, have a particular congeniality with the mind, and are welcomed to the memory as the offspring of philosophy. This compendium, presenting in a condensed form, pruned of all redundancies, the leading and important principles, rules, and definitions of law and equity, as laid down in the standard elementary works, will be found far more accurate and systematic than notes hastily taken by the student while reading the course, to say nothing of the immense saving of time, and the advantage of print over writing. It contains the pith of all the important branches of the law student's course, accurately collected from Blackstone's Commentaries and leading authors on Evidence, Contracts, Pleadings, and Equity. No index is furnished, because the work is, to some extent, an index itself; besides, it is the desire of the author that the student shall not consider it as a book to be some extent, an index itself; besides, it is the desire of the author that the student shall not consider it as a book to be "tasted" merely, but to be thoroughly "chewed and digested;" he can scarcely skim it over if he would, for it is the cream of the law, gathered from the purest and highest sources known to legal science, and the diligent student will find it richer to his professional taste as he partakes of it from day to day. The author wishes here to repeat his closing remarks in the preface to the first edi-

tion—that this work is not intended as a substitute for text-books, but simply to lighten the labors and shorten the work of the student when he shall have carefully read the **WHOLE COURSE** and commenced his *review*, preparatory to final examination for the bar.

M. E. D.

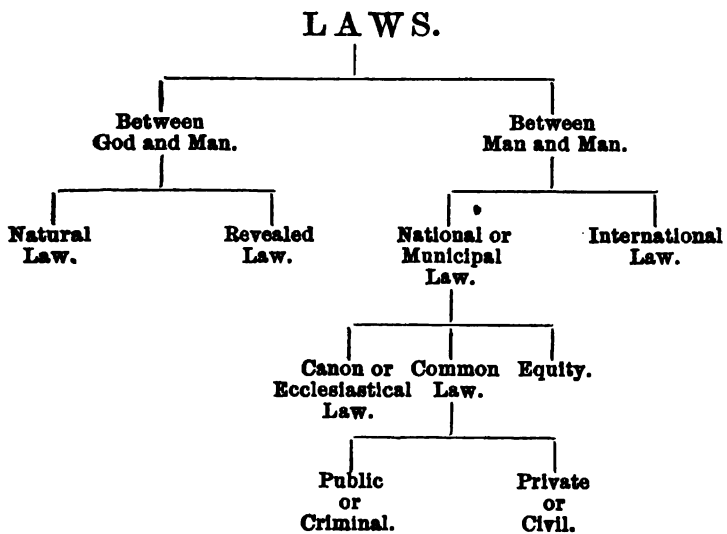
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"The LORD is *our fudge*, the LORD is *our law-giver*, the LORD is *our king*." — *Isatah xxxiit*.

LAW. "Her seat is the bosom of God, her voice is the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempt from her power." — *Hooker*.

**THE SEVERAL
DEPARTMENTS OR BRANCHES OF LAW**

MAY BE THUS SHOWN



SIR WILLIAM BLACKSTONE was born in Cheapside, London, July 10th, 1723, the third son of a silkman and bowyer.

Being in early life deprived of both parents proved, in its consequences, the reverse of misfortune, as to that circumstance probably he was indebted for his future opportunities for advancement.

He was educated at Oxford, under the care and assistance of his uncle; entered the Bar in 1746, and was chosen Vinerian Professor at Oxford in 1758; was a member of Parliament, and in 1770 a judge of the Common Pleas.

He died February 14th, 1780, in the fifty-seventh year of his age, a member of the Established Church.

BLACKSTONE began to execute his lectures on the Laws of England in 1753.

The first volume, under the title of *Commentaries on the Laws of England*, appeared in 1765.

COMMENTARIES
ON THE
LAWS OF ENGLAND,
BY
BLACKSTONE.

ABRIDGED.

BLACKSTONE'S ARRANGEMENT

OF THE

COMMENTARIES

IS AS FOLLOWS:

INTRODUCTION.

Of the *study* of the law.

The *nature* of laws in general.

The *grounds* and foundations of the laws of England.

The *countries* subject to those laws.

The *objects* of the laws of England, which are

RIGHTS AND WRONGS,

VIZ.:

THE RIGHTS OF PERSONS	.	.	.	.	.	<i>Book I.</i>
THE RIGHTS OF THINGS	.	.	.	.	.	<i>Book II.</i>
PRIVATE WRONGS	.	.	.	.	.	<i>Book III.</i>
PUBLIC WRONGS	.	.	.	.	.	<i>Book IV.</i>

THE NATURE OF LAWS IN GENERAL.

LAW is a rule of action prescribed by superior power.

In its most general and comprehensive sense, it signifies a rule of action dictated by some superior, and which the inferior is bound to obey. It is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational; as, for example, we speak of the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations.

In its more confined sense, it denotes the rules, not of action in general, but of human action or conduct—that is, the precepts by which man, a creature endowed with both reason and a free will, is commanded to make use of those faculties in the general regulation of his behavior.

Law is “the perfection of reason—it always intends to conform thereto—and that which is not reason is not law.”

Justinian reduces the whole doctrine of law to these three general principles: “Live honestly, hurt nobody, and render to every one his just due.”

Natural law is the will of our Maker, and, regarded as a rule of human action or conduct, as prescribed by Him in nature, it is the eternal and immutable law of good and evil, *discoverable* by the light of reason, and founded in those relations of justice that existed in the nature of things antecedent to any positive precept.

Divine or revealed law, considered as a rule of action, is also the law of nature, imparted by God himself.

The law of nations is a system of rules deducible from reason and natural justice, and established by universal consent, to regulate the conduct and mutual intercourse between independent states.

It is also called "that code of public instruction which defines the rights, and prescribes the duties, of nations in their intercourse with each other."

MUNICIPAL OR CIVIL LAW is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."

It is called a rule, *first*, because it is not a transient or sudden order from a superior to, or concerning, a particular person, but something permanent, uniform, and universal; *second*, to distinguish it from advice or counsel; *third*, to distinguish it from a compact or agreement, for a compact is a promise proceeding from us—law is a command directed to us.

It is called a rule of civil conduct to distinguish it from the natural and revealed law, the former being the rule of *moral* conduct, and the latter the rule of moral conduct and of *faith*.

It is a rule prescribed because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law.

It is prescribed by the supreme power in a state because legislation is the greatest act of superiority that can be exercised by one being over another.

Society is formed for the protection of individuals, and is founded in their *wants* and *fears*.

Governments and states are formed for the preservation of society. They are all reducible to three regular forms of government, viz. :

A Democracy, which generally has more public virtue, or goodness of intent, than other forms, but may be deficient in wisdom to contrive and strength to execute.

A Monarchy, which is the most powerful and dangerous of all governments.

An Aristocracy, which is supposed to have more wisdom than the other forms of government, but less honesty than a republic and less strength than a monarchy.

The British form of government partakes of the advantages of these *three*: The King, or Queen, representing the monarchical form; The House of Lords, the aristocratic form; and

the House of Commons, the democratic form, of government; these three elements *united* constituting the English *Parliament* or supreme power of that state.

A law consists of four parts, viz.: the *declaratory*, which defines what is right and wrong; the *directory*, which consists in commanding the observation of right or prohibiting the commission of wrong; the *remedial*, whereby a method is pointed out to recover private rights or redress private wrongs; and the *vindicatory* part, which signifies what punishment shall be incurred by wrong-doers; and *in this* consists the main strength and force of a law.

To interpret a law, we must inquire after the will or intention of the maker, which is collected from the words, the context, the subject-matter, the effects and consequences, or the spirit and reason, of the law.

Words are generally to be understood in their most known and usual signification—their general and popular sense. Terms of art, or technical terms, must be taken according to the acceptation of the learned in art, trade, and science.

The context may aid in establishing the meaning of words still dubious.

The subject-matter. — Words are always to be understood as having a regard thereto, for it is always supposed to be in the eye of the legislator, and all his expressions directed to that end.

Of the effects and consequences, the rule is, that when words bear either none or a very absurd signification, if literally understood, we must a little deviate from the received sense of them.

The reason and spirit of a law, considered, is the most universal and effectual way of discovering its true meaning, or the causes which moved its enactment; for *when the reason ceases, the law itself ought to cease*.

EQUITY arises from this method of interpreting laws by *the reason and spirit of them*. Grotius defines equity to be "the correction of that wherein the law (by reason of its universality) is deficient."

The object of equity is to give a more specific relief than can sometimes be had, through the generality of both the unwritten and written law, in matters of private right.

Equity *depends*, essentially, upon the particular circumstances of each case; hence there can be no established rules and fixed precepts of equity laid down without destroying its very essence and reducing it to *positive* law.

Courts of equity are necessary because, when the general decrees of the law come to be applied to particular cases, there should be vested somewhere the power of defining those circumstances which, had they been foreseen, the legislator himself would have expressed; but the liberty of considering all cases in an equitable light must not be indulged in too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge.

The purposes for which our courts of equity are established, and the matters with which they only are conversant, are: to *detect* latent frauds and concealments, which the process of the courts of law is not adapted to reach; to *enforce* the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to *deliver* from such dangers as are owing to misfortune or oversight; and to give a *relief* more specific and better adapted to the circumstances of the case than can always be obtained by the generality of rules of the *positive* or *common law*.

They are only conversant in matters of property or private right.

OF THE LAWS OF ENGLAND. — The municipal law of England is divided into two kinds: the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.

The unwritten or common law includes: *general customs*, or the common law, properly so called; *particular customs* of certain parts of the kingdom; and those *particular laws* that are, by custom, observed only in certain courts and jurisdictions.

General customs, or the common law, properly so called, are founded upon immemorial universal usage, whereof judicial decisions are the evidence, which decisions are preserved in the public records, explained in the year-books and reports, and digested by writers of approved authority.

The unwritten or common law, then, derives its *binding power* and the *force of law* from long and immemorial usage and universal reception throughout the kingdom.

The degree of antiquity necessary in a custom to entitle it to weight and authority is that it must have been used time out of mind, or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary.

The maxims and customs of the common law are to be *known* and their *validity determined*, by the *judges*, in the courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land.

Of precedents. — The doctrine of the law is that they *must be followed* unless flatly absurd, unjust, unreasonable, or clearly contrary to the *divine* law; for though the reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without due consideration.

PARTICULAR CUSTOMS are those which are only in use within some particular districts, as gavel-kind, the customs of London, etc.

The rules relating to particular customs are, *first*, they must be proved to exist; *secondly*, they must appear to be legal — that is, immemorial, continued, peaceable, reasonable, certain, compulsory, and consistent; and *thirdly*, they must, when allowed, receive a strict construction.

The seven necessary requisites to make a particular custom good or legal are: *first*, that it hath been used so long that the memory of man runneth not to the contrary; *secondly*, it must have been continued, for any interruption would cause a temporary ceasing, and the revival would give it a new beginning, which will be within time of memory, and

thereupon the custom will be void; *thirdly*, it must have been peaceable and acquiesced in — not subject to contention and dispute; *fourthly*, customs must be reasonable or rather, taken negatively, they must not be unreasonable; *fifthly*, customs ought to be certain; *sixthly*, customs, though established by consent, must be (when so established) compulsory, and not left to the option of every man whether he will use them or not; and *seventhly*, customs must be consistent with each other — one custom cannot be set up in opposition to another.

The decisions of the courts of justice are the *evidence* of what is common law.

The *law* and the *opinion of the judge* are not always convertible terms, or one and the same thing, since it sometimes may happen that the judge may mistake the law.

The reports containing the decisions of the courts of England are extant in a regular series from the reign of Edward II. (1307) inclusive, and from his time to that of Henry VIII. (1509) they were taken at the expense of the Crown and published *annually*, whence they are known as *The Year-Books*.

Particular laws are such as, by special custom, are adopted and used only in certain peculiar courts, under the superintendence and control of the common and statute law, viz.: the Roman *civil* and *canon* law.

By the civil law is generally understood the civil or municipal law of the Roman Empire, as comprised in the Institutes, the Code, and the Digest of the Emperor Justinian, and the novel constitutions of himself and some of his successors. The former were compiled by Tribonian and other lawyers, by direction of Justinian, about A. D. 528. It took them three years, and consist of: *first*, the *Institutes*, which contain the elements or first principles of the Roman law, in four books; *secondly*, the *Digests* or *Pandects*, in fifty books, containing the opinions and writings of eminent lawyers; *thirdly*, a new *Code*, or collection of imperial constitutions, in twelve books: and *fourthly*, the *Novels*, or new constitutions

posterior in time to the other books, and amounting to a supplement to the Code, containing new decrees of successive emperors; the whole forming the body of the *Roman Civil Law*.

The canon law is a body of Roman ecclesiastical law, relating to such matters as that Church either has, or claims to have, the proper jurisdiction over. It consists of the compiled opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls or edicts of the Holy See.

The written or statute law — the *lex scripta* — is made by the supreme power in the state, to supply the defects, or amend what is amiss, of the unwritten law.

The courts in which the civil and canon laws are permitted to be used are: the Courts of the Archbishops and Bishops, and their derivative officers; the Military Courts; the Admiralty Courts; and the Courts of the Two Universities; but they are all under the superintendency of the *Courts of Common Law*.

Statutes are either general or special, public or private, and are declaratory of the common law, or remedial of small defects therein.

The rules to be observed in the construction of statutes are:

1st. There are three points to be considered in the construction of all remedial statutes, viz.: the *old law*, the *mischief*, and the *remedy*.

2d. A statute which treats of things or persons of an *inferior* rank cannot, by any general words, be extended to those of a *superior*.

3d. *Penal* statutes must be construed strictly.

4th. Statutes against *frauds* are to be *liberally* and *beneficially expounded*.

5th. One part of a statute must be so construed with another that the *whole* may stand, if possible.

6th. A *saving* totally repugnant to the body of the act is void.

7th. Where the common law and a statute differ, the common law gives place to the statute, and an old statute gives place to a new one.

8th. If a statute that repeals another is itself repealed afterwards, the first statute is thereby revived without any formal words for that purpose.

9th. Acts of Parliament derogatory from the power of subsequent Parliaments bind not.

10th. Acts of Parliament that are impossible to be performed are of no validity.

THE TERRITORY OF ENGLAND is divided into *Ecclesiastical* and *Civil*, or *Lay*.

The ecclesiastical part is divided into provinces, dioceses, archdeaconries, rural deaneries, and parishes.

The civil divisions are into counties or shires, of which some are *palatine*; then into rapes, lathes, or tithings; next, into hundreds or wapentakes; and lastly, into towns, vills, or tithings. Ten families of freeholders made a *town* or *tithing*, ten tithings composed a *hundred*, and an indefinite number of these hundreds formed a *county* or *shire*.

Counties palatine were so called because the owners thereof had in those counties royal powers as fully as the King in his palace.

THE OBJECTS OF THE LAWS of England are *Rights* and *Wrongs*.

Rights are privileges; they are *commanded* to be observed by law, and are subdivided into the *rights of persons*, being those which concern and are annexed to the persons of men; and the *rights of things*, which are such rights as a man may acquire over external objects or things unconnected with his person.

Wrongs are the privation of right; they are *prohibited* by law, and are divided into *private wrongs*, which being infringements of particular rights merely, concern individuals only, and are called *civil injuries*; and *public wrongs*, which, being breaches of general and public rights, affect the whole community, and are called *crimes* and *misdeemeanors*.

BOOK I.



THE RIGHTS OF PERSONS.

ANALYSIS OF BOOK I.

The rights of persons ; which are

- 1. Natural persons, whose rights are
 - 1. Absolute, viz. : the enjoyment of
 - 1. Personal security,
 - 2. Personal liberty,
 - 3. Private property.
 - 2. Relative; as they stand in relations
 - 1. Public; as
 - 1. Magistrates; who are
 - 1. Supreme,
 - 1. Legislative, viz. : the Parliament,
 - 2. Executive, viz. : the King, wherein of his
 - 1. Title,
 - 2. Royal family,
 - 3. Councils,
 - 4. Duties,
 - 5. Prerogative,
 - 6. Revenue.
 - 1. Ordinary, viz. :
 - 1. Ecclesiastical,
 - 2. Temporal.
 - 2. Extraordinary
 - 2. Subordinate.
 - 2. People; who are.
 - 1. Aliens, or
 - 2. Natives; who are
 - 1. Clergy, and
 - 2. Laity; who are in a state
 - 1. Civil,
 - 2. Military,
 - 3. Maritime.
 - 2. Private; as
 - 1. Master and servant,
 - 2. Husband and wife,
 - 3. Parent and child,
 - 4. Guardian and ward.
- 2. Artificial persons, viz. : bodies politic, or corporations :
 - 1. Ecclesiastical, or
 - 2. Lay; either of which may be
 - 1. Aggregate, or
 - 2. Sole.

BOOK I.

THE RIGHTS OF PERSONS, being such as concern and are annexed to the persons of men, when the persons *to whom* they belong, or are due, is regarded, are called (simply) *rights*, in the popular acceptation; but when we consider such as are due *from* every citizen, they are denominated (civil) *duties*.

Persons are divided by law into *natural* persons, or such as the God of nature formed us; and *artificial*, or such as are created by human laws for the purpose of society and government, which are called *corporations*, or bodies politic.

The rights of natural persons are: *absolute*, or such as belong to individuals; and *relative*, or such as are incident to them as members of society.

The absolute right of individuals are those rights which are so in their primary and strictest sense; such as would belong to their persons merely in state of nature, and which every man is entitled to enjoy, whether out of society or in it.

To protect individuals in the enjoyment of these absolute rights, which were vested in them by the immutable laws of nature, is the principal aim of society.

To maintain and regulate these absolute rights of individuals is the first and primary end of human laws.

Liberty is the general appellation for the natural rights of man, and every man gives up a part of his *natural liberty* when he enters into society as the price of so valuable a purchase.

Political or civil liberty is natural liberty, so far restrained by human laws as is necessary for the good of society.

The absolute rights of Englishmen have been declared and established, *first*, by the Charter of Liberties, obtained from

King John, called *Magna Charta*; afterwards, by the statute *confirmatio chartarum*, directing the great charter to be allowed as the common law; next, by a multitude of corroborating statutes; then, by the Petition of Right, the *Habeas Corpus* Act, and other salutary laws passed under Charles II; again, by the Bill of Rights of 1688; and lastly, by the Act of Settlement.

The absolute rights, or civil liberties, of men are principally three, viz.: the right of personal security, the right of personal liberty, and the right of private property.

The right of personal security consists of a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

By limbs are meant only those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law.

Duress per minas is where a man, through fear of death or mayhem, is prevailed upon to execute a deed, or to do any other legal act. These may be afterwards avoided if forced upon him by a well-grounded fear of losing his life, or even limbs, in case of his non-compliance.

Civil death occurs when any man is banished by the process of common law, or abjures the realm, or enters into religion — i. e., into a monastery — and becomes a professed monk, in which cases he is absolutely *dead in law*, and his next heir shall have his estate.

The right of personal liberty consists in the free power of locomotion, without legal restraint or banishment.

Lawful imprisonment is effected by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison, which warrant must be in writing, under the hand and seal of the magistrate, and express the cause of commitment, in order to be examined into by a *habeas corpus* if necessary. Coke says, "the law judges, like Festus, the Roman governor, that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him."

Habeas corpus is a writ requiring the body of a person imprisoned to be brought before the Court of King's Bench or Common Pleas, who shall determine whether the cause of commitment be just.

The right of private property consists in the free use, enjoyment, and disposal of one's acquisitions, without any control or diminution, save only by law.

The relative rights, or relations of persons, as members of society, are either *public* or *private*.

THE PUBLIC RELATIONS are those of *magistrates* and *people*, the most universal relation by which men are connected together being *government*.

Prerogative is that special pre-eminence which the King hath over and above all persons, and *out* of the ordinary course of the common law, in right of his regal dignity.

The people are divided into natives, or natural-born subjects, aliens, and denizens.

Aliens are such as are born out of the realm, or allegiance, of the King.

Denizens are such born as aliens, but who have obtained letters patent (naturalization) to make them subjects.

Natives, or natural-born subjects, are such as are born within the dominions of the Crown of England — that is, within the ligeance, or, as it is generally called, the *allegiance*, of the King.

The rights of natives are natural and perpetual; those of aliens, local and temporary only, unless made denizens.

The natives, or people proper, are divided into the *clerical*, or *ecclesiastical*, which includes all persons in holy orders or offices; and the *laity*, which comprehends all the rest of the nation.

The laity are divided into the civil, the military, and the maritime.

The civil state is divided into the *nobility* and *commonalty*, and includes all the nation except the clergy, the army, and the navy.

The degrees of the nobility are: dukes, marquises, earls, viscounts, and barons.

The degrees of the commonalty are: vidames (now quite out of use), knights, colonels, sergeants-at-law, doctors, esquires, gentlemen, yeomen, tradesmen, artificers, and laborers.

Allegiance is the duty of all subjects, being the reciprocal tie or *ligamen* which binds the subject to the King in return for that protection which he affords them.

The oath of allegiance was the oath taken to a superior lord, or lord paramount, only, *without* any saving or exception whatever, to bear faith to one's sovereign lord, in opposition to all men, etc.

Fealty was the obligation on the part of the vassal to his *immediate* and superior lord.

The oath of fealty, or the feudal oath of fidelity, was the parent of our oath of allegiance, and was couched in almost the same terms as the oath of allegiance, but contained a *saving* or exception of the faith or allegiance due to the superior lord or King; hence it was the oath taken to the *inferior* lord.

Homage was the *submission* of the tenant or vassal to his lord, coupled with the oath and promise, and was performed by openly and humbly kneeling, ungirt, uncovered, and holding up his hands between those of the lord, and swearing that he "became his man from this day forward, for life, for limb, and worldly honor, and unto you shall be true and faithful, and bear you faith for the land I hold of you," etc., and then received a kiss from his lord.

THE PRIVATE RELATIONS of persons in society are: those of master and servant, husband and wife, parent and child, and guardian and ward.

Servants are menial or domestic; *apprentices* are usually bound for years; *laborers* are hired by the day or week, and are not part of the family; and *stewards, factors, or bailiffs*, the law considers as servants *pro tempore*.

The master has a property in the service of his servant,

and must be answerable for such acts as the servant does by his express or implied command or assent.

Marriage the law regards in, no other light than as a civil contract, and holds it good where the parties were able, willing, and did actually contract in the proper forms and solemnities required by law.

Disabilities to marriage are canonical or civil.

Canonical disabilities are: pre-contract; consanguinity, or blood relationship; affinity, or relationship by marriage; and some corporeal infirmities. They are sufficient by the ecclesiastical law, to avoid the marriage in a spiritual court, but in our law they only make it voidable, and not *ipso facto* void until sentence of nullity be obtained.

The civil disabilities are: a prior marriage, want of age, non-consent of parents or guardians where requisite, and want of reason. They render the marriage void *ab initio*, and not merely voidable.

Marriage is dissolved by death or divorce. Divorce is of two kinds: a *vinculo matrimonii*, or from the bond of matrimony, which is total; and a *mensa et thoro*, or from bed or board, which is partial only.

Children are of two sorts: *legitimate* and *spurious*, or *bastards*.

The duties of parents to their children are: maintenance, protection, and education.

Legitimate children are those born in lawful wedlock, or within a competent time thereafter.

Bastards are those born out of lawful matrimony.

The main end and design of marriage is to ascertain and fix upon some certain person to whom the care, protection, maintenance and education of children should belong.

Guardian and ward, a temporary relation between persons which the law hath provided, is a kind of artificial parentage, to supply the deficiency when it happens of the natural.

We have guardians *by nature*, or the parents; guardians *for nurture*; guardians *in socage*, or *by the common law*, which last

two are only until the infant attains the age of fourteen; and guardians *by statute*, assigned by the father's will.

Full age in an infant, male or female, is twenty-one, which age is completed on the day preceding the anniversary of a person's birth.

An infant may be sued only under the protection and joining the name of his guardian, and an infant may sue either by his guardian, or *prochein amy* or next friend, who is not his guardian, but any person who will undertake the infant's case.

An infant, in respect to his tender years, has various *privileges* and various *disabilities* in law, chiefly with regard to suits, crimes, estates and contracts.

An infant in ventre sa mere is considered in law, for many purposes, as born. It is capable of having a legacy, or a surrender of a copyhold estate, made to it; it may have a guardian assigned to it, and it is enabled to have an estate limited to its use, and to take afterward, by such limitation, as if it were then actually born.

CORPORATIONS, bodies politic or corporate, or *artificial* persons established for preserving in perpetual succession certain rights which, being conferred on natural persons only, would fall in process of time.

Their primary division is into *aggregate*, consisting of many members; and *sole*, consisting of but one, as a king, bishop, or parson.

Corporations, sole or aggregate, are either *ecclesiastical* or *spiritual*, erected to perpetuate the rights of the church; or *lay*, as college, etc.

LAY CORPORATIONS are *civil*, erected for many temporal purposes, or *eleemosynary*, erected to perpetuate the charities of the founder.

Corporations are created generally by act of parliament; by royal charter; and by prescription, of which the city of London is an instance — it has existed so long.

The powers incident to corporations are: to maintain perpetual succession; to act in their corporate capacity like

an individual; to purchase and hold lands; to have a common seal by which the corporation acts and speaks only; and to make by-laws or private statutes for its own government and regulation.

A corporation's privileges and disabilities are: it must always appear by attorney, being, as Coke says, "invisible;" it cannot maintain or be made defendant in a battery or like personal actions, nor commit crime in its corporate capacity, for it is not liable to corporeal penalties; it cannot be an executor, or perform any personal duties, for it cannot take the oath of due performance; it cannot be seized of lands to the use of another, for such kind of confidence is foreign to the end of its institution; it cannot be committed to prison, outlawed or excommunicated.

Corporations, as they cannot be arrested, are made to appear by distress on their lands and goods.

The duty of corporations is to answer the ends of their institution which may be enforced by visitations.

A corporation may be dissolved by act of parliament, by natural death of all its members, by surrender of its franchises, and by forfeiture of its charter — through negligence or abuse of its franchises.

BOOK II.

THE RIGHTS OF THINGS.

(THE LAW OF REAL PROPERTY.)

ANALYSIS OF BOOK II.

The rights of things, which consist in dominion over

1. THINGS REAL, in which are considered
 1. Their several kinds, viz.:
 1. Corporeal, or
 2. Incorporeal.
 2. The tenures by which they may be holden, viz.:
 1. Ancient, and
 2. Modern.
 3. The estates therein, with respect to
 1. The quantity of interest, viz.:
 1. Freehold.
 1. Of inheritance, or
 2. Not of inheritance.
 2. Less than freehold, and
 3. On condition.
 2. The time of enjoyment, viz.: in
 1. Possession,
 2. Remainder, or
 3. Reversion.
 3. The number and connection of the tenants, who may hold in
 1. Severalty,
 2. Joint tenancy,
 3. Coparcenary, or in
 4. Common.
 4. The title to them, which may be gained or lost by
 1. Descent, or by
 2. Purchase, which includes
 1. Escheat,
 2. Occupancy,
 3. Prescription,
 4. Forfeiture, and
 5. Alienation, by common assurances; which are by
 1. Deed, or matter IN PAIS, wherein of its
 1. General nature, and
 2. Several species.
 2. Matter of record,
 3. Special custom, and by
 4. Devise.
2. THINGS PERSONAL, or chattels, in which are considered
 1. Their distribution,
 2. Property therein,
 3. Title to them, which may be gained or lost by
 1. Occupancy,
 2. Prerogative,
 3. Forfeiture,
 4. Custom,
 5. Succession,
 6. Marriage,
 7. Judgment,
 8. Gift or grant,
 9. Contract,
 10. Bankruptcy,
 11. Testament,
 12. Administration.

BOOK II.

THE RIGHTS OF THINGS are those rights which a man may acquire in, and to such external things as are unconnected with, his person.

Property, or the dominion of man over external objects, has its *origin* from the *Creator*, as his gift to mankind.

The *substance* of things was, at first, common to all; yet a *temporary* property in the *use* of them might even then be acquired and continued *by occupancy*. In process of time a *permanent* property was established in the *substance*, as well as the *use*, of things, which was also originally acquired by occupancy only.

Lest this property should determine by the owner's dereliction or death, whereby the thing would again become common, societies have established conveyances, wills, and heirships, in order to continue the property of the first occupant; and where, by accident, such property becomes discontinued or unknown, the thing usually results to the sovereign of the state by virtue of the municipal law.

Things are divided into *things real* and *things personal*.

THINGS REAL are such as are of a permanent, fixed, and immovable nature, and cannot be carried out of their place, as lands and tenements. (1)

NOTE 1. — **Land** is the soil of the earth and includes everything erected upon its surface, or which is buried beneath it. The term land includes the buildings upon it, the trees growing upon it, and the minerals embedded in it.

It is a rule of law that a permanent annexation of a thing in itself personal to the soil makes it a part of the realty. In such a case, such things are called **fixtures**. Fixtures are things personal in nature, which become realty by reason of their annexation to the soil. To become a fixture the personalty must be annexed to the realty by some actual or constructive attachment.

Things personal are such as goods, money, and other movables, which may attend the owner's person wherever he may choose to go.

Things real are *usually* said to consist in lands, tenements, and *hereditaments*.

Land is a term comprehending all things of a permanent, substantial nature being a word of very extensive signification.

Land has, in its legal signification, an indefinite extent upwards as well as downwards—*cujus est solum, ejus est usque ad cælum*—so that the word *land* includes not only the face of the earth, but everything under it or over it; and by the name of *land* everything terrestrial will pass.

Tenement is a word of still greater extent than land, and, in its original proper and legal sense, it signifies *anything that may be holden*, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind.

Hereditament is by much the largest and most comprehensive expression, for it includes not only lands and tenements, but *whatsoever may be inherited*, be it corporeal or incorporeal, real, personal or mixed.

All the several kinds of things real are reducible to one of these three, viz. : lands, tenements, or hereditaments, whereof the second includes the first, and the third the first and second.

Things real may be considered with reference to their several *kinds*; the *tenures* by which they may be holden; the *estates* therein; and their *title*, or the means of acquiring and losing them.

THE KINDS OF THINGS REAL are *corporeal* or *incorporeal*, which is also the division of *hereditaments*—the most comprehensive denomination of things real.

Corporeal hereditaments are such as affect the senses—may be seen and handled by the body; they consist wholly of *permanent* and *substantial objects*, all of which may be comprehended under the general denomination of *land* only.

Incorporeal hereditaments are not the objects of sensation—can neither be seen nor handled; are creatures of the mind, and exist only in contemplation. *They are rights* issuing out of things corporate, whether real or personal; or concerning, or annexed to, or exercisable within the same.

They are principally of ten sorts, viz.: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

An advowson is the right of presentation to a church or ecclesiastical benefice, either *appendant*—i. e., annexed to the possession of the manor (lords of manor being originally the only founders and patrons of churches)—or *in gross*, as where separated from the *property* of the manor and annexed to the *person* of the owner, and not to his manor or lands.

Advowsons are also either *presentative*, where the patron has a right of presentation, and to demand of the bishop to institute his clerk if qualified; *collative*, where the bishop and patron are one and the same, in which case the bishop cannot present to himself, but does by the act of collation all that is done by institution and induction; or *donative*, as where the King, or any subject by his license, doth found a church, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitations only, and not that of the ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction.

Tithes are the tenth part of the yearly increase arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants.

"Time of memory" has long ago been ascertained, by law, to commence from the beginning of the reign of Richard I.

Tithes are either *predial*, as corn, grass, hops, and wood; *mixed*, as wool, milk, pigs, etc.; or *personal*, as of manual occupations, trades, fisheries, and the like.

Common is a right or profit which a man has in the land of

another, as to feed his beasts, catch fish, dig turf, and the like. It is chiefly of four kinds, viz.: (2)

NOTE 2.—A right of common is distinguished from a right of way, the discussion of which immediately follows, in that the former is a right to take something of the land itself, as grass, turf, etc. A right of way is a right to use the land merely, without taking anything of the land itself.

Common of pasture is a right of feeding one's beasts on another's land, and is either *appendant*, as when inseparably incident to the grant of the lands; *appurtenant*, where it arises from no connection of tenure or absolute necessity, but *may* be annexed to lands, or extended to other beasts besides such as are generally commonable, as hogs, goats, etc., which neither plow nor manure the ground; *of vicinage*, where the inhabitants of two contiguous townships have intercommoned to prevent suits; or *in gross*, where it is annexed to a man's person instead of to land.

Common of piscary is a right of fishing in another man's water.

Common of turbary is a right of digging turf on another's ground.

Common of estovers, or botes, is a right of taking necessary wood from off another's estate.

Ways are a right of passing over another's ground and has reference only to private ways. They may be founded on permission, grant, and prescription, or may arise from act and operation of law. (3)

NOTE 3.—Ways are now commonly called easements, and the law on this class of incorporeal hereditaments has developed greatly since Blackstone wrote. An easement is the right of one owner of land to either use another's land in a particular manner, or prevent that other from using his land in a particular manner. Two estates are needed to make an easement, the estate of the man who has the right to use or prevent the other from using his estate in a certain way, is the dominant estate, the latter is called the servient estate. Easements are acquired (1) by express grant, e. g., by deed,

or (2) by implied grant, as where the easement is so essential to an estate granted that it must be implied to prevent the conveyance from operating as an injury to the grantee; (3) or by prescription, as where the easement is presumed to have been originally granted to the owner of the dominant estate, since he has enjoyed it for the period covered by the Statute of Limitations.

The common easements are right of way, light and air, water, support and party walls.

Rights of way are public, where enjoyed by the public generally, and private, where the right belongs only to one or two.

Easement of light and air is the right of the owner of the dominant tenement to have the light and air come on his land unobstructed by an erection on the servient tenement.

Easement of water is the right of a land owner to the free and unrestricted flow of a stream of water on the adjacent proprietor's land. Easement of support or the right of subjacent and lateral support is the right of one owner of land to the support of the land of the adjacent owner, whereby the latter may not so excavate his land so as to cause the other owner's land to fall or cave. But this right extends only to land in its natural condition,—free from build-ings.

Easement of party wall is where one wall is erected between two lots and the adjoining owners each own a half of the wall with an easement in support for the other half.

A license is a right to use the land of another in a certain manner. It differs from an easement in that it is not created by deed or prescription, but orally and by implication. Because of this manner of creation a license is not a right or interest issuing out of land, but a mere permission to use it, which is held to be revocable in most cases at the will of the licensor.

Offices are the right to exercise a public or private employment, and to take the fees and emoluments pertaining thereto.

Dignities are titles to honor, and bear a near relation to offices.

Franchises are a royal privilege, or branch of the King's prerogative, subsisting in the hands of the subject.

Franchise and *liberty* are used as synonymous terms.

Corodies are allotments of provisions for one's sustenance, which may be converted into *pensions*.

Annuity is a yearly sum of money charged upon the *person*, and not upon the lands, of the grantor.

Rents are certain profits issuing yearly out of lands and tenements corporeal. The rents at common law were rent-service, rent-charge, and rent seck.

Rent-service is so called because it has some corporeal service incident to it; as, at least, fealty or the feudal oath of fidelity.

Rent-charge is where the owner of the rent has no future interest or reversion expectant in the land, and it is called a rent-charge because the land was charged with a distress for the payment of the rent.

Rent-seck, or barren rent, is a rent reserved by deed, but without any clause of distress.

Rents of assise are the certain established rents of the freeholder and ancient copyholders of a manor, which cannot be departed from or varied. Those of the freeholders were frequently called *chief-rents*, and those of both indifferently denominated *quit-rents*, because thereby the tenant goes quit and free of all services. When the quit rents were reserved in silver they were called *white-rents* in contradistinction to rents received in work, grain, or baser money, which was called *black-mall*.

Rack-rent is a rent of the full value of the tenement, or near it.

A **fee-farm rent** is a rent-charge issuing out of an estate in fee of at least one-fourth of the value of the lands at the time of its reservation.

TENURES BY WHICH THINGS REAL MAY BE HOLDEN.

The English doctrine of tenures is derived from the *feudal law* or *system*, which had its origin from the military policy of the Northern or Celtic nations — the Goths, Huns, Franks, Vandals, Lombards, etc. — who, all migrating from the same *officina gentium*, poured themselves in vast quantities into all the regions of Europe at the declension of the Roman Empire. Bringing this policy from their own coun-

tries, they continued it in their new acquisitions as the most likely means of securing them.

Feuds, *fiefs*, or *fees* — in their original synonymous — were allotments of large districts or parcels of land made by the conquering chief or general to the superior officers of their armies, and by *them* dealt out again, in smaller parcels, to the inferior officers and most deserving soldiers under them.

The appellation *feud*, *fief*, or *fee*, signified in the Northern language a conditional *stipend* or *reward*, and the condition annexed to them being that the possessor should do service faithfully for them to him who gave them, both at home and in wars, for which purpose he took the feudal oath of fealty, and in case of breach of this oath or condition the lands reverted to him who granted them.

The universality and early use of this feudal plan among all those nations, which, in compliance to the Romans, we still call barbarous, may appear from what is recorded of the Cimbri and Teutons, nations of the same Northern origin as those we have been describing, at their first irruption into Italy, about a century before the Christian era. They demanded of the Romans stipendiary lands or feuds to be allotted to them, to be held by military and other personal services, whenever their lord should call upon them. *This* was evidently the same constitution that displayed itself more fully about seven hundred years afterwards, when the Salii, Burgundians, and Franks broke in upon Gaul, the Visigoths upon Spain, and the Lombards upon Italy, and introduced with themselves this Northern plan of polity as best serving to distribute and protect the territories they had newly gained. Hence the Emperor Alexander Severus took the hint of dividing lands conquered from the enemy among his generals and victorious soldiery, on condition of receiving military service from them and their heirs forever.

The wisdom and efficiency of this policy of the victorious Northerners alarmed all the princes of Europe, and made them think it necessary to enter into the same plan with *their* subjects, whose possession before was perfectly *allodial* — that

is, independent, and held of no superior; and thus in a few years the feudal constitution or doctrine of tenures extended itself over all the western world, which alteration of landed property in so material a point drew after it an alteration of laws and customs, so that the feudal laws soon drove out the Roman, which had hitherto so universally obtained, but now became for many centuries lost and forgotten.

But this feudal polity, thus by degrees established over all Europe, was not received universally into that part of the island called *England* until the reign of William the Norman, for the Saxons were firmly settled in the island as early as the year 600, and it was not till two centuries after that feuds arrived at full vigor in Europe.

This introduction of the feudal tenures into England by King William does not appear to have been effected immediately after his conquest, nor by the mere arbitrary will and power of the conqueror, but to have been gradually established by the Roman barons and others, and afterwards universally consented to by the great council of the nation, long after his title was established, upon the principle of self-security.

In consequence of this change, it became a fundamental *maxim* and *necessary principle* — though in reality a mere *fiction* — of our English tenures, “that *the King* is the universal lord and original proprietor of all the lands in his kingdom, and that no man doth or can possess any part of it but what has mediately or immediately been derived as a *gift from him* to be held upon feudal services.”

In this system of tenure, in general *the grantor* was called the proprietor or *lord*, and retained the dominion or ultimate property of the feud or fee; and the grantee who had only the use or possession, was styled the feudatory or *vassal*, which was only another name for the tenant or holder of the lands.

The King — the *original* grantor — was styled the *lord paramount*, or over all; those who held immediately under him being styled his tenants *in capite*, or in chief; and they who

held under these *mesne* or middle lords were styled tenants *parvail*, or the lowest tenants, who made the *avail* or profit from the land.

The feudatories were styled *pares curtis*, or *pares curiæ*, because the lord was the legislator and judge over his feudatories.

The manner of granting a feud was by words of gratuitous and pure donation, being perfected by the ceremony of corporeal investiture, or open and notorious delivery of possession in the presence of the other vassals, called *livery* or *seizin*.

Feuds were not at first hereditary, though frequently granted by favor of the lord to the children of the former possessor, till, in process of time, it became unusual, and was, therefore, thought hard to reject the heir if he were capable to perform the service; and, therefore, infants, women, and monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud, and it was for *this* reason that women did not receive the attention, consideration, or privileges, pertaining to property that men did, and many of their disabilities in law to this day may be traced back to this origin, for previous to the introduction of this system the privileges of women in England were generally about the same as those of the men. This succession of the children to their father's feud, or *descent* of the feud, originally extended to *all* the males alike; but, being found inconvenient, and also tending to weaken the strength of the feudal union by multiplicity of these divisions among so many heirs, *honorary feuds*, or *titles of nobility*, were introduced, which were not divisible, and could be inherited only by the eldest son, *in imitation of military feuds*.

Neither lord nor vassal could alien his estate without the consent of the other, because the feudal obligation was looked upon as reciprocal.

The feudatories often found it necessary to commit part of *their* lands to inferior tenants, and obliged such to make *returns* in service, corn, cattle, or money, which returns were the origin of *rents*, which were called improper feuds.

THE ANCIENT ENGLISH TENURES, or the manner in which lands, tenements, and hereditaments were held until the middle of the last century.

Tenure denotes the manner of *holding* or possessing property.

Tenement is the thing holden.

Tenant, the *person* holding lands or tenements by any title.

The *distinction* of tenures consisted in the *nature* of the services or renders that were due to the lords from their tenants.

The services, in respect of their quality, were either *free* or *base*; and, in respect of their quantity and time of exacting them, were either certain or *uncertain*.

Free services were such as were not unbecoming the character of a soldier or a freeman to perform, as to serve under his lord in the wars, to pay a sum of money, and the like.

Base services were such as were fit only for peasants or persons of a servile rank, as to plow the lord's land, make his hedges, etc.

Certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretense, as to pay a stated annual rent, or to plow such a field for three days.

Uncertain services depended upon unknown contingencies, as to do military service in person, pay an assessment in lieu of it, or wind a horn whenever the Scots invaded the realm, which were free services; or to do whatever the lord should command, which was a base or villein service.

From the various combinations of these services have arisen the four principal species of ancient lay tenures which subsisted in England till the middle of the last century, and three of which subsist to this day; hence the *feudal clogs, though greatly lessened, still cling to English property*.

Bracton, who wrote under Henry III., gives the clearest account of these ancient tenures, of which the following is an outline or abstract, viz. :

“Tenements are of two kinds: *frank-tenements* and *villenage*.

“Of frank-tenements, some are held freely in consideration of homage and *knight-service*; others, in *free-socage*, with the service of fealty only.

“Of villenages, some are *pure* and others *privileged*; he holding in *pure villenage* doing whatever is commanded of him, and always bound to an *uncertain* service; and in *privileged villenage*, or *villein-socage*, the villein-soomen do villein services, but such as are *certain* and determined.”

From the sense of which the four principal kinds of *ancient* English tenures appear to have been, viz. :

Tenure in chivalry, or by knight-service, where the service was *free*, but *uncertain*, as military service with homage.

Tenure in free-socage, where the service was not only *free*, but *certain*, as fealty only, or by rent and fealty.

Tenure in pure villenage, where the service was *base* and *uncertain*.

Tenure in privileged villenage, or *villein-socage*, where the service was *base*, but reduced to a *certainty*.

The most universal ancient tenure was that in *chivalry*, or by *knight-service*, to make which a determinate quantity of land was necessary, called a knight's *fee* — *feodum militare* — and differed in but very few points from a pure or proper feud — being entirely military, the tenant or knight being bound to attend his lord forty days in every year, if called upon, as his *reditus* or return, or his rent, or service, for the lands he held. It was granted by livery and perfected by homage and fealty.

The seven fruits and consequences of knight-service, or tenure in chivalry, inseparably incident to it, were: aids, reliefs, primer-seizin, wardship, marriage, fines for alienation, and escheat.

Aids were principally *three*: to ransom the lord's person if taken prisoner, to make the lord's eldest son a knight, and to marry the lord's eldest daughter by giving her a suitable portion. Aids were originally mere *benevolences*, granted by the

tenant to the lord in times of difficulty and distress, but in process of time they grew to be considered as a matter of right, and not of discretion.

Reliefs were a fine, or composition with the *lord*, for taking up the estate, which, by the feudal law, was lapsed or fallen in by the death of the tenant.

Primer-seizin was a right which the *King* had, whenever any of his tenants *in capite* died seized of a knight's fee, to receive of the heir, if he were of age, a whole year's profits of the lands if they were in possession, and half a year's profits if in reversion expectant on an estate for life.

Wardship. — When the heir was under age the lord was entitled to wardship, and was called guardian in chivalry. It consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males and sixteen in females, for the feudal law considered him incapable of knight-service till of age, or twenty-one.

Marriage, or the tendering of a suitable match to their infant wards, was another right the lord had, which, if they refused, they forfeited the value of the marriage to their guardian. This custom grew from the fear of their marrying the lord's enemy.

Fines were due the lord for every alienation of the tenant whenever he had occasion to make over his land to another, which he could not do, however, without the consent of the lord. The lord, also, could not alien his seigniorship without the consent of his tenant, which consent was called his *attornment*, for the feudal obligation was looked upon as reciprocal.

Escheat is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter, by either natural or civil causes, in which case the land *escheated*, or fell back, to the lord of the fee.

Other species of knight-service were:

Tenure by grand-serjeanty was where the tenant was bound to do some special *honorary* service to the King in

person; as to carry his banner, his sword, or the like; or be his butler, champion, or other officer, at his coronation.

Tenure by cornage was a species of grand-serjeanty, and consisted of winding a horn when the Scots and other enemies entered the land, in order to warn the King's subjects.

Escuage, or scutage, was a *pecuniary* satisfaction instead of military service which tenants found means of *substituting* in lieu of the more troublesome *personal attendance* of knight-service. This pecuniary substitute came at last to be levied by assessments, at so much for every knight's fee; but by the laws of Edward I. and Magna Charta no *scutage* could be levied without the consent of Parliament, these *scutages* being the groundwork of all succeeding subsidies, and the *land tax* of later times. By this degeneration of *personal* military duty into *pecuniary* assessments the advantages of the feudal constitution were destroyed.

THE MODERN ENGLISH TENURES are those of the ancient or original English tenures which remained after the destruction of the military or most oppressive of the feudal tenures, which was accomplished at a single blow by the statute 12, Charles II., whereby all tenures except frank-almoigne, grand-serjeanty, and copyholds were reduced to one general species of tenure, called *free and common socage*.

This statute of Charles II. was even a greater acquisition to the civil property of the kingdom than Magna Charta itself, since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved the vigor of them, but the statute of Charles II. extirpated the whole, and demolished both root and branch.

The word *socage* is derived from the Saxon appellation *soc*, which signifies liberty or privilege, and being joined to a usual termination, is called *socage*; in Latin *socagium*, signifying a *free and privileged tenure*.

Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service, and is of two sorts, free socage and villein socage.

TABLE OF TENURES.

LAY TENURES.

I. Frank-tenement, or freehold.	1. Military tenures (abolished except grand-serjeanty, and reduced to free-socage tenures).	<div> <div>1. Knight-service proper, or tenure in chivalry.</div> <div>2. Grand-serjeanty, one species of which is cornage.</div> </div>
	2. Free-socage, or plough service.	<div> <div>1. Petit-serjeanty.</div> <div>2. Tenure in burgage.</div> <div>3. Gavel-kind.</div> </div>
II. Villenage.	1. Pure villenage (whence copyholds at the lord's [nominal] will, which is regulated according to custom).	<div> <div>1. Tenure in ancient.</div> </div>
	2. Privileged villenage, sometimes called villein-socage (whence tenure in ancient demesne, which is an exalted species of copyhold, held according to the lord's will), and is of three kinds.	<div> <div>2. Privileged copyholds, customary freeholds, or free copyholds.</div> <div>3. Copyholds of base tenure.</div> </div>

SPIRITUAL TENURES.

- I. Frankalmoinage, or free alms. | II. Tenure by divine service.

This tenure includes petit-serjeanty, tenure in burgage, and gavel-kind.

Free-socage tenures partook strongly of the feudal nature, as well as those in chivalry, the lands being holden subject to some *service* — at least to fealty and suit of court — and subject to reliefs, wardships, and escheat, but not to marriage. They were also formerly subject to aids, primer-seizin, fines for alienation, and escheat, except in gavel-kind.

Socage tenures were plainly the relics of Saxon liberty, retained by such persons as had neither forfeited them to the King, nor been obliged to exchange them for, as it was called, the more honorable, but more troublesome, tenure of knight-service. This is peculiarly remarkable in the tenure prevailing in Kent, called *gavel-kind*, which is generally acknowledged to be a species of socage tenure, the preservation whereof from the innovations of the Normans is a fact universally known.

The service must be *certain* to denominate it *socage*, and the important distinction between tenure by knight-service and tenure in socage is, that where the services were *free* and *honorable*, but *uncertain* as to the *time of their performance* — as military service, cornage, and the like — it was called *tenure in knight-service*, or *chivalry*; but where the service was not only *free*, but also *certain* — as by fealty only, or by rent and fealty — this was *tenure by free-socage*, or *liberum socagium*.

Petit-serjeanty consisted of holding lands of the King by the rendering to him annually some small implement of war, as a bow, sword, lance, arrow, and the like. It differs from grand-serjeanty in that the latter was a *personal service* instead of a *tribute service* or *render*. Their resemblance is that both tend to some purpose relative to the King's person.

Tenure in burgage is where the King or other person is lord of an ancient borough, in which the tenements are held by a rent certain. It is a kind of *town-socage*; as common-socage, by which other lands are holden, is usually of a *rural* nature.

Borough English is an incident of burgage tenure, and provides that the *youngest* instead of the eldest son shall succeed to the burgage tenement on the death of his father by reason of the custom of *marcheta*.

Gavel-kind is also a species of socage tenure, modified by the customs of the country, the lands being holden by *suit of court* and *fealty*, a service in its nature *certain*.

The distinguishing *properties* of *gavel-kind* (which before the Norman conquest was the general custom of the realm) are various, the principal of which is that the tenant is of age sufficient to alien his estate by feoffment at the age of *fifteen*. The estate *does not escheat* in case of an attainder and execution for felony. In most places the tenant could *devise his lands* by will before the statute for that purpose was made. The lands *descended to all the sons together*, which indeed was anciently the course of descent over all England, though in some particular places particular customs prevailed.

That *socage tenures* partake of *feudal nature* or origin, as apparent from a comparison of their incidents and consequences with those of tenure in *chivalry*, probably arise from its more ancient Saxon original; since, as before observed, feuds were not unknown among the Saxons though they did not form a part of their military policy, nor were they drawn out into such arbitrary consequences as among the Normans.

Villeins were a sort of people in downright servitude under the Saxon government, who were not only used and employed in the most servile works, but *belonged*, both they and their children and effects, to the lord of the soil, like the cattle or stock upon it. They were either *regardant* — that is, annexed to the manor or land; or else *in gross*, or *at large* — that is, annexed to the *person* of the lord. They were transferable by deed from one person to another, but could acquire no property in land or goods. The law, however, protected the *persons* of villeins as the King's subjects against atrocious injuries of the lord.

Pure villenage, then, was a precarious and *slavish* tenure

at the absolute will of the lord, upon *uncertain* services of the *basest* nature.

Copyhold tenures were the tenures of those descended from, or who were originally, villeins, but who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the will of the lord, which customs were evidenced by the rolls of the courts baron, in which they were entered and kept on foot by the constant immemorial usage of the manors in which the lands lay; so they began to be called *tenants by copy of court-roll*, and the tenure, a *copyhold*. These tenures were subject, like *socage* tenures, to service, relief, and escheat; also to *heriots*, wardship, and fines upon descent and alienation.

Privileged villenage, or villein-socage, is an exalted species of copyhold tenures upon *base*, but *certain*, services. The tenants could not alien or transfer their tenements by grant or feoffment any more than pure villeins could. It was a tenure subsisting only in the ancient demesne of the Crown, whence it is also denominated the *tenure of ancient demesne*. These exalted species of *copyhold tenures of ancient demesne* have divers immunities annexed to them, but are still held by copy of court-roll, but according to the custom of the manor, and not the will of the lord.

Ancient demesne consists of those lands or manors which, though now perhaps granted out to private subjects, were actually in the hands of the Crown in the time of Edward the Confessor or William the Conqueror, and so appear to have been, by the great survey called Domesday-book, compiled about the nineteenth year of William I.

Tenure in frankalmoine, or *free-alms*, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors forever.

ESTATES IN THINGS REAL.—An estate in lands, tenements, or hereditaments, signifies such *interest* as the tenant has therein, to ascertain which we consider the *quantity*

of interest, the time of enjoyment, and the number and connection of the tenants.

The quantity of interest is measured by its *duration* and *extent*, thus: either the tenant's right of possession is to subsist for an uncertain period of his own life, or the life of another; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives forever. This occasions the primary division of estates into *freehold* and *less than freehold*. There is also another species, called estates *upon condition* (whether freehold or otherwise), whose existence depends upon the happening or not happening of some uncertain event.

An estate of freehold — *liberum tenementum*, or *frank-tenement* — is such as is created by *livery of seisin* at common law; or, in tenements of an incorporeal nature, by what is equivalent thereto.

Estates of freehold are divided into estates *of inheritance* and *not of inheritance*.

Estates of inheritance are divided into inheritances absolute, or *fees-simple*; and inheritances limited, or *limited fees*.

Of inheritances absolute, or fees-simple, in freehold estates of inheritance.

A tenant in fee-simple, or *tenant in fee*, is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever — generally, absolutely, and simply — without mentioning what heirs, but referring that to his own pleasure or the disposition of the law.

Fee — *feodum* in its true and original meaning is the same as *feud* or *fief*, and, in its primary sense, was taken in *contradistinction* to *allodium*, as now used. *Fee* then meant that which was held of some superior, on condition of rendering him service, and in which superior the ultimate property, or real ownership of the land, resided. A subject, therefore, had only the usufruct, and not the absolute property, of the

soil. We express the strongest and highest estate that *any* subject can have by the words, "he is seized thereof, *in his demesne, as of fee.*" It is a man's *demesne*, or property, since it belongs to him and his heirs forever; yet it is his *demesne as of fee*, because it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

A *fee*, therefore, in general, signifies an estate of inheritance, being the highest and most extensive interest that a man can have in lands.

A tenant in fee-simple is he that hath lands and tenements to hold to him and his heirs forever.

Fee-simple *now* signifies a lawful or pure inheritance, *fee* signifying inheritance, and *simple* is added for that it is descendible to his heirs *generally*—that is, *simply*, without restraint. The word *simple* is also annexed to *distinguish it from other fees*, as fee-tail, fee-conditional, and the like.

A *fee*, then, is an estate of inheritance in law, belonging to the owner, and transmissible to his heirs, and is an estate that may continue forever.

In order to make a *fee* or *inheritance*, the word "*heirs*" is necessary in the grant; for if lands be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life only. The *exceptions* to this rule are: devises by will; fines and recoveries, considered as a species of conveyance; in creations of nobility by writ, though when by patent the word must be inserted; in grants to sole corporations; and in case of the King.

Inheritances, limited or limited fees, are divided into *qualified* or *base fees*, and *fees-conditional*—so called at common law, and afterwards, in consequence of the statute *de donis fees-tail*.

Limited fees are such estates of inheritance as are clogged and confined with conditions or qualifications of any sort.

A *base* or *qualified fee* is one having a qualification subjoined thereto, and which must be determined whenever the

qualification annexed to it is at an end; as, if a grant be made to A and his heirs, *tenants of the Manor of Dale*, whenever the heirs of A cease to be tenants of that manor the grant is entirely defeated.

A conditional fee, at the common law, was a fee *restrained to some particular heirs*, exclusive of others; as, to the *heirs of a man's body*, by which only his *lineal* descendants were admitted, in exclusion of collateral heirs; or to the *heirs male of his body*, in exclusion of both collaterals and lineal females also.

It was called a conditional fee by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs the land should *revert* to the donor.

Now the *condition* annexed to these fees by the common law, when performed, is entirely gone, and the fee to which it was before annexed and *qualifying* became *absolute* — e. g., a gift to a man and the heirs of his body was a gift upon condition that it should revert to the donor if the donee had not the heirs prescribed, but to remain to him if he had such heirs; hence as soon as the donee had the required heirs born to him, his estate was no longer conditional, but became absolute by the performance of the condition.

It was, therefore, construed at common law to be, and called, a fee-simple on condition that the donee had the heirs prescribed.

The donee of a conditional fee had the power to *convey*, or *alien in fee*, as soon as the condition was *performed*, and *thereby debar his own issue*, and also the possibility of a *reversion* to the donor. Now this right of alienation by the donee was repugnant to the nobility, who were anxious to perpetuate their possessions, and they alleged that it was a breach of the condition for the grant or gift. They, therefore, procured the passage of the Statute of Westminster the Second (1272), commonly called the statute *de donis conditionalibus*, for the express purpose of preventing the donee of a *conditional fee* from aliening the land as soon as issue was born, and for the

purpose of securing the *reversion* to the grantor. This statute, therefore, provided that the lands or tenements given to the donee and the heirs, or certain heirs, of his body should, in every event, go to such *issue* if there were any, or, if none, should *revert* to the donor.

The origin of fee-tail and reversion is from the construction given by the judges to this statute *de donis*, they determining that the donee had no longer a *conditional fee-simple*, which became absolute and at his own disposal the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee-tail, and vested in the donor the *ultimate* fee-simple of the land, *expectant* on the failure of issue, which expectant estate we now call a *reversion*.

A fee-tail, then, in its original, was a conditional fee shorn of the right of alienation after condition performed, and vesting in the donor an indefeasible reversion.

Donor is, properly, one who gives lands to another in *tail*.

A *fee-tail* is so-called because it is *entailed* — that is, *limited* as to how long it shall continue.

As the word “heirs” is necessary to create a fee so the word “body” or some other words of procreation, are necessary to make a *fee-tail* in order to ascertain to *what* particular heirs the fee is limited or restrained.

So if a grant be made to a man and his *issue of his body*, to a man and his seed, to a man and his *children* or *offspring*, all these are only estates for life, there wanting the words of inheritance, “his heirs.”

Estates-tail are either *general* or *special*. *male* or *female*, or given in *frank-marriage*.

Tail-general is where lands and tenements are given to one and *the heirs of his body begotten*, because, how often-soever such donee may be married, his issue in general by all and every such marriage is in successive order capable of inheriting the estate-tail, *per formam doni*.

Tail-special is where the gift is restrained to *certain* heirs of the donee's body, and does not go to all of them in general as, if lands be given to a man and the heirs of his body, *on Mary his now wife to be begotten*.

Tail-male general is where lands are given to a man and his *heirs male of his body begotten*.

Tail-female special is where lands are given to a man and the *heirs female of his body on his present wife begotten*.

In case of an entail *male*, the heirs female shall never inherit, nor any derived from them; nor *e converso*, the heirs male in case of a gift in tail-female.

Frank-marriage is where tenements are given by one to another, together with a wife, who is the daughter or cousin of the donor, to hold in *frank-marriage*. By such gift, though nothing but the word *frank-marriage* is expressed the donees shall have the tenements to them and the *heirs of their two bodies begotten* — that is, they are tenants in *special tail*.

The inconveniences resulting from this tying up of the landed property by *estates-tail* were avoided about two hundred years after the enactment of the statute *de donis* by the invention of *fines* and *common recoveries*, which removed the limitations upon them, and passed an absolute and pure fee-simple.

Freehold estates not of inheritance are *for life* only. They are either *conventional*, expressly created by the act of the parties; or *legal*, created by construction and operation of law.

Conventional estates for life are created by an express deed or grant, whereby a lease of lands or tenements is made to a man to hold for the term of his own life, or for that of any other person, or for more lives than one, in any of which cases he is called *tenant for life*; when he holds the estate by the life of another he is usually called tenant *pur autre vie*.

It is a rule of law that all grants are to be taken most strongly against the grantor, unless in the case of the King.

An estate is granted to one for the term of his "natural life" generally, because it may be determined by his *civil* death if

granted for "his life" only; but one's natural life can only be determined by his *natural* death.

Incident to *all* estates for life are *estovers* and *emblements*.

Estovers is the right of the life tenant to use the wood on the land for fuel, fences or other agricultural purposes.

If a tenant for life sows the land and dies before harvest, this is a determination of the term by the act of God, and he, or rather his personal representatives, are entitled to the *emblements*, or growing crops.

The legal estates for life are *tenancy in tail after possibility of issue extinct*, *tenancy by the curtesy of England*, and *tenancy in dower*.

Tenancy in tail after possibility of issue extinct occurs where one is a tenant in special tail, and a person from whose body the issue was to spring dies without issue, or having left issue, that issue becomes extinct.

A possibility of issue is always supposed to exist in law unless extinguished by the death of the parties, even though the donees be each of them a hundred years old.

Tenancy by the curtesy of England is where a man marries a woman seized of an estate of inheritance — that is of lands and tenements in fee-simple or fee-tail — and has by her issue born alive, which was capable of inheriting her estate; in this case he shall, on the death of his wife, hold the lands for his natural life as *tenant by the curtesy*.

The four *requisites* necessary to make a tenancy by the curtesy of England are *lawful marriage*, *seizin of the wife during coverture*, *issue born alive* and *death of the wife*.

As soon as any child was born, the father began to have a permanent interest in the lands and was called tenant by the curtesy initiate, and this estate being once vested in him by the birth of the child, was not determined by the subsequent death or coming of age of the child. Upon the wife's death, the husband's estate became consummate. (4)

NORM 4. — In Blackstone's time the seisin of the wife had to be actual, but at the present time a husband has curtesy in lands of

which his wife has only legal seisin. He is entitled to curtesy in his wife's equitable as well as legal estate, but not in any estate of which she has a remainder or reversion, unless the prior estate be determined during coverture.

Tenancy in dower is where a woman's husband is seized of an estate of inheritance, of which her issue might by any possibility have been heir, and the husband dies; in this case the wife shall have the third part of all the lands and tenements whereof he was seized at any time during coverture, to hold for her natural life.

Dower was either by *common law* or that just described; by *particular custom* — as, that the wife should have half the husband's lands, or, in some places, the whole, and in some only a quarter; *dower ad ostium ecclesie*, which is where the person openly at the church door, endowed the wife with such quantity as he pleased of his lands, to be enjoyed after his death; or *dower ex assensu patris*, which is only a species of the kind last mentioned, and is made when the husband's father is alive, and the son, by his consent, endows his wife with parcel of his father's lands.

The most usual species of dower was that by common law.

To be endowed, the woman must be the actual wife of the party at the time of his decease. She has dower in all lands, tenements and hereditaments, corporeal or incorporeal, of which her husband was seized, either in law or in deed, in fee simple or fee tail at any time during coverture. After the husband's death the widow has the right to remain in her husband's mansion forty days, called the widow's quarantine, during which time her dower shall be assigned to her, by the heir of the husband or his guardian. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially.

Dower may be set out "of common right," and "against common right." Dower of "common right" occurs where the heir or court sets out the dower to the widow by metes and bounds; and if this has been done and she afterwards

loses part of it by the assertion of a paramount title, she is entitled to a reassignment of the remainder of her husband's estate. But if the assignment be "against common right" she is not entitled to a redistribution. An assignment "against common right" occurs when dower is assigned by mutual agreement of the parties.

Dower may be barred or prevented in various ways, the most usual method being by jointure.

Jointure, which was in lieu of satisfaction of dower, is a competent livelihood of freehold for the wife of lands and tenements, to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least.

If the jointure was made *after* marriage, she had her election after her husband's death to accept or reject it, and betake herself to her dower at common law, for she was not capable of consenting to it during coverture. (4)

NOTE 4. — Dower is barred by the wife joining with her husband in the conveyance of the land; by her elopement and adultery with another man; and by an absolute divorce granted for her fault.

At present time the widow has dower in equitable as well as legal estates.

Homesteads. By statutes in every State an estate is created called a homestead which is like a life estate. Any person who is the "head of a family," i. e., has others legally dependent on him and who owns real estate on which he lives may hold that real estate, or so much of it as the statute mentions free and exempt from execution for his debts. Where a husband claims a homestead in land he cannot convey it clear of the homestead right of his wife in it unless she joins in the conveyance — the homestead exists after the death of the husband during the life of the widow and the minority of the infant children.

ESTATES LESS THAN FREEHOLD are: estates for years, estates at will, and estates by sufferance.

An estate for years is a contract for the possession of lands or tenements for some *determinate* period. Every estate which must expire at a *period certain* is an estate for years.

Where a man seized of lands and tenements letteth them to another for a certain period of time, which gives the tenant or lessee a right of entry on the lands only, which right is called his *interest in the term*, and he is possessed not properly of the land, but of the *term of years* — the possession or seizin of the land remaining in him who hath the freehold.

It is called a term because its duration is bounded, limited, and determined.

The legal difference between *the term* and *the time* of a lease, for years, is that the word *term* does not merely signify the *time* specified in the lease, but the *estate* also, and *interest* that passes by that lease; therefore, the *term* may expire during the continuance of the time, as by surrender, forfeiture and the like,

A lease for years may be made to commence in futuro, though a lease for life cannot. For no estate of freehold can commence in futuro, because it cannot be created at common law without livery of seisin or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter.

Where an estate for years is determined by any uncertain or unforeseen contingency, as by an act of God, the tenant or his executors shall have the *emblements*, as in case of tenant for life, but not if determined by his own act. (5)

NOTE 5. — Every estate for years must be created by contract between the owner or landlord and the tenant and by the Statute of Frauds all leases of three years or over must be put in writing. Covenants are clauses in a lease covering certain agreements between the landlord. They may be express, *i. e.*, set out in full, or implied, *i. e.*, arise by implication of law from the employment of certain words as "grant," "lease," "demise." The chief implied covenants are for quiet enjoyment, for rent and against waste. The relation of landlord and tenant may be terminated (1) by eviction, which may be either actual, — where the tenant is actually ousted of possession by a stranger claiming under a paramount title or dispossessed by the landlord, or constructive, — where the landlord renders the enjoyment of the premises impossible to the tenant: (2) by surrender by the tenant to the immediate reversioner whereby the estate becomes merged.

An estate at will is where lands and tenements are let by one man to another, to hold at the will of both parties, and the lessee enters thereon.

Under this estate the tenant shall have the *emblements* unless the estate be determined by his own act.

An estate at will is terminated by any act of ownership exerted by the lessor, or by any act of the lessee inconsistent with the tenure.

Owing to the distress caused by landlords of tenancies at will suddenly terminating the tenancy, there grew out of this class of estates tenancies from year to year. Where a rent was paid by the lessee for any fixed period of time, neither the lessor nor the lessee may terminate the lease, without giving the other due notice of his intention of doing so. Thus arose estates from year to year, which are estates for an indefinite number of fixed periods, as months, quarters or years. After the creation of tenancies from year to year out of tenancies at will, only those estates to last for an indefinite time and where no rent was reserved remained as tenancies at will.

An estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all.

ESTATES UPON CONDITION, whether freehold or otherwise, are such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.

Estates upon condition are divided into those upon condition *implied* and those upon condition *expressed*, the latter including estates held in *vadio*, gage or pledge; estates by statute staple, or statute merchant; and estates held by *elegit*.

Estates upon condition implied, *in law*, are where the grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words; as, if a grant of an office be made to a man generally, without adding other words, the law tacitly

annexes thereto a secret *condition* that the grantee shall duly execute his office.

Estates upon condition expressed in the grant itself are estates granted in fee-simple or otherwise, with an express qualification or provision annexed, whereby the estate shall either commence, be enlarged, or defeated, upon the performance or breach of such qualification or condition.

Conditions expressed are either *precedent*, such as must happen or be performed *before* the estate can vest; or *subsequent*, such as by the failure or non-performance of which an estate, *already* vested, may be defeated.

These express conditions, if they be impossible at the time of their creation, or afterwards, become impossible by act of God, or the act of the feoffa himself, or if they be contrary to law or repugnant to the nature of the estate are void. So, if they be conditions subsequent, that is to be performed after the estate is vested, the estate shall become absolute in the tenant; but if the condition be precedent, here the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant.

A condition in law is one *impliedly* annexed by law to the grant.

A condition in deed is one *expressly* mentioned in the deed or contract between the parties, and the *object* of them is either to avoid or to defeat an estate.

A condition in deed is either *general* or *special*; the former puts an *end* altogether to the tenancy *on entry* for the breach of the condition; the latter only authorizes the reversioner to enter on the land and take the profits, and *hold the land by way of pledge* until the condition be performed.

Persons who have an estate of freehold subject to a *condition* are *seized*, and may *convey or devise the same*, though the estate will continue defeasible, or subject to the condition till the condition be performed, destroyed or released.

A limitation in law is where an estate is so expressly confined and limited by the words of its creation that it can-

not endure for any longer time than till the contingency happens upon which the estate is to fail.

The material distinction between a condition in a deed and a limitation in law consists in this: that a *condition* (in deed) does not defeat the estate, although it be broken, the law permitting it to endure unless the grantor, or his heirs or assigns *enter* and take advantage of the breach of the condition; but it is the nature of a *limitation* (in law) to determine the estate when the period of limitation *arrives*, *without entry* or claim, no act being requisite to vest the right in him who has the next expectant estate.

It is a rule of law that he who enters for a condition broken becomes seized of his first estate, and he avoids all intermediate charges and incumbrances.

An estate *for years* ceases as soon as the condition is broken, but an estate *of freehold* does not cease after condition is broken *until entry* or claim.

Words of limitation mark the *period* which is to determine the estate; words of condition render the estate *liable* to be defeated.

The one specifies the *utmost* time of continuance, and the other marks some event, which, *if* it takes place in the course of that time, will defeat the estate.

A conditional limitation is where a *condition subsequent* is followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it.

A collateral limitation gives an interest for a specified period, but makes the right of enjoyment to depend on some collateral event; as where an estate is limited to a man and his heirs, tenants of the manor of Dale.

Estates in gage, vadio, or pledge, are estates granted as a security for money lent, and are of two kinds: *vivum vadium* or living pledge; and *mortuum vadium*, or dead pledge, or mortgage.

Vivum vadium, or living pledge, is where a man borrows money of another, and grants him an estate at so much per annum, to hold till the rents and profits shall repay the

sum borrowed. This is upon condition, to be void on repayment of the loan, and the land or pledge is said to be *living*, as it subsists and survives the debt, and on discharge of the same the land results back to the borrower.

Mortuum vadium, dead pledge, or mortgage, is where a man borrows money of another and grants him an estate in fee on condition that if he, the mortgagor, shall repay the mortgagee the sum borrowed, on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; but in case of nonpayment at the time limited, the land put in pledge is, by law, forever dead and gone from the mortgagor, and the mortgagee's title is absolute.

As soon as the estate is created the mortgagee may immediately enter upon the land, but is liable to be dispossessed upon performance of the condition by payment of the mortgage money on the day limited. Hence it was usual for the mortgagor to hold the land till the day assigned for payment, when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility at law of being afterwards evicted by the mortgagor. But Courts of Equity interpose, and, though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at common law, yet they will consider the real value of the tenements compared with the sum borrowed, and if the estate be of greater value than the sum lent thereon, they will allow the mortgagor any reasonable time to redeem his estate, which is called the *equity of redemption*. (6)

NOTE 6. — A mortgage is a transfer of property as security for a debt. As between the parties in law, it is regarded as a transfer of the legal title, leaving in the mortgagor the right to redeem. In equity a mortgage is regarded as a lien or security for the debt, and the mortgagee's interest is only a chattel interest until foreclosure. At the present time it is customary for the mortgagor to remain in possession until there has been a breach of condition and foreclosure. The rents and profits of this mortgaged estate go to whoever is in possession, — if the mortgagor, they belong to him absolutely; if the mortgagee, he must apply them to the expenses of management of the estate, then to paying the interest on the mortgage and finally to pay-

ing off the debt covered by the mortgage. Payment of the mortgage debt or a tender of payment of the same by any one having an interest in the mortgaged premises and claiming under the mortgagor, works a discharge of the mortgage unless such payment be made by one liable as a surety or indorser of the mortgage note, or by one who has a right to redeem, and such payment was not made with the intention to discharge the mortgage. In such case the rights of the mortgagee are transferred to the person making such payment.

The laws provide for registration of mortgages, and a mortgage duly registered is constructive notice to all subsequent purchasers and incumbrancers, and gives to the recorded mortgage priority over any subsequently acquired interests.

Foreclosure was where the mortgagee either compelled the sale of the estate, in order to get the whole of his money immediately, or called upon the mortgagor to redeem his estate presently, or, in default thereof, to be forever *foreclosed* from redeeming the same — that is, lose his equity of redemption. (7)

NORM 7. — There are two kinds of foreclosures: (1), where the mortgagee brings suit to compel the mortgagor to pay the mortgage debt within a certain time, or on failure to do so, to lose forever his right of equity of redemption: (2), equitable foreclosure — where the court orders the land to be sold and the mortgage debt to be satisfied out of the proceeds of sale in the order of priority. If there be any surplus after so doing, it is returned to the mortgagor. A decree in foreclosure bars the interest of the mortgagor and all claiming under him who have been made parties to the suit.

Deeds of trust are conveyances in the nature of mortgages, where the owner and debtor transfers the property to a trustee, in trust to secure the creditor, and the trustee is authorized to sell the property conveyed if the debtor fails to pay the debt when due.

Estates by statute merchant and statute staple are very nearly related to *vivum vadium*, being also estates conveyed to creditors, in pursuance of certain statutes, till their profits shall discharge the debt.

Both are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13, Edward I., *de mercatoribus*, and thence called *statute merchant*; the other, pursuant to statute 27, Edward

III., before the mayor of the staple, whence called *statute staple*.

Estates by *elegit* are another kind of conditional estates, created by operation of *law*, for the security and satisfaction of debts.

Elegit (he has chosen) is the name of a writ founded on the statute Westminster Second, by which, after a plaintiff has recovered judgment for his *debt*, at law, the sheriff gives him possession of one-half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid, and during the time he so holds them he is called *tenant by elegit*.

TIME OF THEIR ENJOYMENT. — Estates are either in *possession* or *expectancy*, the *latter* being created at the same time, and are parcel of the same estates as those upon which they are expectant.

Estates in *possession*, or *executed*, are those whereby a *present* interest passes; and, not being dependent on any subsequent circumstances, there is but little to be said of them, all hitherto considered being estates of this kind.

Estates in *expectancy*, or *executory*, are such as are to be enjoyed in the *future*, and depend on some subsequent circumstance or contingency.

They are of two kinds: *remainder*, created by *act of parties*; and *reversion*, created by *act or operation of law*.

An estate in *remainder* is an estate limited to take effect and be enjoyed *after* another estate is determined; as where lands are granted to A for twenty years, *remainder* to B in fee.

Both these *interests* are but different *parts of one whole* estate or inheritance; they are both created, and may subsist *together* — the one in *possession*, the other in *expectancy*; hence no remainder can be limited after the grant of an estate in fee-simple, because the tenant in *fee* hath in him the *whole* of the estate.

The three rules of law to be observed in the creation of remainders are: *first*, there must necessarily be some

particular estate *precedent* to the estate in remainder; *secondly*, the remainder must commence or pass out of the grantor at the time of the creation of the particular estate; *thirdly*, the remainder must vest in the grantee during the continuance of the particular estate, or *eo instant* that it determines.

The precedent estate spoken of in the first rule is called the *particular* estate, being only a small *part* or *particular* of the inheritance or fee.

The use or necessity of the precedent particular estate was to prevent an abeyance of the freehold, as at common law an estate of freehold could not be created to commence *in futuro*; and for that the *remainder*, as its name implies, was but a *part* only of the thing disposed of.

It was a rule of the common law that an estate of freehold could not be created to commence *in futuro*; but that it ought to take effect *presently* (immediately) either in *possession* or *remainder*, because at common law no freehold in lands could pass without livery of seizin, which must operate *immediately* or not at all.

In granting, then, an estate of freehold to be enjoyed *in futuro*, it is necessary to create a previous or precedent particular estate, to subsist *till that period*, and for the grantor to deliver *immediate* possession of the land to the tenant of this particular estate, which is *construed* to be giving possession to him *in remainder*, since his estate and that of the particular tenant are *one* and the same estate *in law*.

The whole estate passes at once from the grantor to the grantees, the remainder man being seized of his remainder at the same time that the termor is seized of his term.

While the enjoyment of the remainder is deferred, it is to all intents and purposes an estate commencing *in presenti*, though occupied and enjoyed *in futuro*.

The particular estate is said to *support* the remainder; hence it is generally true that if the particular estate is void in its creation, or by any means defeated afterwards, the remainder supported by it is defeated also.

Remainders are of two kinds: *vested* or *contingent*.

Vested remainders are where the estate is fixed to remain to a *determinate person* after the particular estate is spent.

An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seizin.

It is the present *capacity* of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder.

Contingent remainders are such where the estate in remainder is limited to take effect, either to a *dubious or uncertain person*, or upon a dubious or *uncertain* event, that the particular estate may chance to be determined, and the remainder never take effect.

Contingent remainders, to a person not in being, must, however, be limited to some one, that may by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines.

Contingent remainders, if they amount to a freehold, can not be limited on an estate for *years*, or on any particular estate *less* than a freehold.

For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder, it must vest in the particular tenant, else it can vest nowhere.

It is not the uncertainty of enjoyment in the future, but the uncertainty of the *right* to that enjoyment, which marks the difference between a vested and contingent interest. (8)

NOTE 8. — The contingent event, upon the happening of which the remainder is to vest, must not be illegal or against good morals.

The contingent event must not abridge the particular estate so as to defeat it before its natural termination.

There must be a particular estate to precede a remainder, for it necessarily implies that a part of the estate has been already carved out of it, and vested in immediate possession in some other person.

The reason of the rule requiring a contingent remainder to be supported by a freehold was that the freehold should not be in abeyance, and that there should be always a visible tenant of the freehold, who might be made tenant to the *præcipe*, and answer for the services required.

If the particular estate terminates before the remainder can vest, the remainder is gone forever, for a freehold cannot, according to the common law, commence *in futuro*.

If the particular estate determines, or be destroyed, before the contingency happens upon which the expectant estate depended, and leaves no right of entry, the remainder is annihilated. (9)

NOTE 9. — A contingent remainder may be destroyed (1) by disseisin of the particular tenant: (2) by merger of the particular estate and remainder in one person, (3) by the particular tenant conveying by feoffment a greater estate than he had.

The rule in Shelley's case declares that when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, "*his heirs*" are words of *limitation* of the estate, and not words of purchase.

The rule is of positive institution, and in direct variance with rules of construction, for, while the latter seek to promote the *intention* of the parties, the former subverts it.

The origin of the rule in Shelley's case is attributed to the aversion the common law had to the inheritance being in *abeyance*, and the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor, thereby giving him the power of disposition over it.

The policy of the rule was that no person should be permitted to raise in another an estate which was essentially an estate of *inheritance*, and at the same time make the heirs of that person *purchasers*.

In order that the *heirs* of the ancestor might, in time, enjoy

the estate, as well as the ancestor himself while living, it was necessary and usual, in order to prevent him from incumbering or alienating the estate, to grant him a particular estate *for life*, and the remainder to his *heirs*. By the *fixed rule* of construction or legal interpretation, which always sought for the *intention* of the parties to written instruments, the ancestor would have only the *use* and enjoyment of the estate *for life*, and *then* it would go to his heirs, who would take it, not from the ancestor by inheritance, but as an original and independent estate from the grantor, *by purchase*, for any estate not acquired by inheritance is said to be acquired by purchase.

But by a *fiction* in law — making the word *heirs*, or *heirs of his body*, in the transfer of estates, create a fee-simple or a fee-tail — the rule in Shelley's case declares, in substance, that the words "*his heirs*," in the grant, *merge* the life estate and the remainder, and cast the fee-simple or whatever the estate may be, upon the ancestor, thus making him the absolute owner of the whole estate. He could then partially or totally defeat the expectations of his relatives and the will of the grantor.

Hence we see that when a freehold is granted to a man and remainder to *his heirs*, it is equivalent to giving him a fee-simple, or the entire estate. (10)

NOTE 10. — The rule in Shelley's case has been abolished by statute in many States, which allow the ancestor merely an estate for life and the heirs take the remainder by purchase.

Coke says that "where the ancestors a freehold take, the words 'his heirs' a limitation make."

An *executory devise* is such a disposition of lands by will that thereby no estate vests at the death of the deviser, but only on some future contingency.

An *executory devise* differs from a *remainder* in three very material points, viz.: *first*, it needs not any particular estate to support it; *secondly*, by it a fee-simple, or other less estate, may be limited after a fee-simple; and, *thirdly*, by this

means a remainder may be limited of a chattel interest after a particular estate for life created in the same.

An executory devise is, in effect, a contingent remainder, without any precedent particular estate to support it — a *freehold*, commencing *in futuro* — and such a grant or limitation would be void in a *deed*, but is good in a will by way of *executory devise*.

An executory devise is a limitation by will of a future contingent interest in lands, *contrary* to the rules of limitations of contingent estates in conveyance.

The reason of the institution of executory devises was to support the *will* of the testator, for when the testator intended to create a contingent remainder, and it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise.

As by executory devise a freehold interest could pass without livery or seizin — that is, commence *in futuro* — it needed no particular estate to support it, the only use of which is to make the remainder by its unity, with the particular estate, a present interest.

As stated, by executory devise a fee, or other less estate, may be limited after a fee; as, if a man devise lands to A and his heirs, but if he dies before the age of twenty-one, then to B and his heirs this remainder, though void in a deed, is good by way of executory devise.

There are two kinds of executory devises relating to real estate: *first*, where the deviser parts with his whole estate, but upon some contingency qualifies the disposition of it, and limits an estate upon that contingency; *secondly*, where the testator gives a future interest to arise upon a contingency, but does not part with the fee in the meantime.

Until the contingency happens, the fee passes, in the usual course of descent, to the heirs at law.

The utmost length of time allowed for the contingency of an executory devise to happen in is that of a life or lives in being, and twenty-one years thereafter, for the law

so abhors perpetuities that it will not allow even wills to create them.

A valid executory devise cannot exist under an absolute power of disposition in the first taker.

Executory devises *differ* from contingent remainders in that the latter relate only to lands; executory devises relate to *personal*, as well as real, estate. Contingent remainders require a freehold to precede and support them; an executory devise does not. Contingent remainders must vest, at furthest, at the instant the preceding estate determines; but an executory devise may vest after the determination of a precedent estate. A contingent remainder may be barred and destroyed by different means; but an executory devise cannot be so prevented or destroyed by any alteration whatsoever in the estate out of which, or after which, it is limited.

A reversion is the residue of an estate left in the grantor, to commence in possession, *after* the determination of some particular estate granted out by him.

Coke says that it is the returning of the land to the grantor or his heirs after the grant is over.

The fee-simple of the land must abide somewhere, and if he who has before possessed of the whole carves out of it any less estate and grants it away, whatsoever is not granted remains in him.

Hence a reversion is never created by deed or writing, but always arises from *construction of law*.

The doctrine of merger is that whenever a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated, or is said, in law phrase, to be *merged* or drowned in the greater.

An estate-tail is an exception to this rule, for a man may have in his own right an estate-tail and a reversion in fee, and they will not merge, being preserved from merger by operation of the statute *de donis*.

NUMBER AND CONNECTIONS OF THE TEN-

ANTS. — Estates may be held in *severalty*, in *joint-tenancy*, in *coparcenary* and in *common*.

An estate in *severalty* is where one holds lands in his own right only, without any other person being joined or connected with him in point of interest during his estate therein.

An estate in *joint-tenancy* is where lands or tenements are granted to *two or more persons*, to hold in any manner, in which case the law construes them to be joint-tenants, unless the words of the grant expressly exclude such construction.

The creation of an estate in *joint-tenancy* depends on the wording of the deed or devise by which the tenants claim title, for this estate can only arise by purchase or grant — that is, *by act of the parties* — and never by the mere act of law.

Joint-tenants, therefore, are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase.

The properties of an estate in joint tenancy are derived from its *unity*, which is fourfold, viz.: unity of interest, unity of title, unity of time, and unity of possession. In other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. They are said to be seized *per my et per tout* — by the half or moiety, and of all; that is, they each of them have the entire possession, as well of every parcel as of the whole; therefore, upon the decease of one joint-tenant the entire tenancy remains to the survivors, and, eventually, to the last survivor. This is the nature and consequence of *unity* and *entirety* of their interest, and is called the doctrine of survivorship, or *jus accrescendi*.

This estate may be dissolved by destroying any one of its constituent unities.

When, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a

sameness of interest, an undivided possession, a title vesting at one and the same time, and by one and the same act a grant; the jointure is instantly dissolved.

An estate in coparcenary is where an estate of inheritance descends from the ancestor to two or more persons.

They are called parceners for brevity and because they may be constrained to make partition.

It arose at *common law*, where a person died and his next heirs were two or more females, as daughters, sisters, aunts, cousins, or their representatives; and by *particular custom*, as where lands descend, as in gavel-kind, to *all* the males in equal degree, as sons, brothers and uncles. In either case these *co-heirs* were called *parceners*; they *all* inherit, and together make but *one* heir, and have but one estate among them.

Estates in coparcenary are in some respects like those in joint-tenancy, having the same *unities of interest, title, and possession*, but *differ* in that they always claim *by descent*, whereas joint-tenants always claim *by purchase*. Though having a *unity*, they have not an *entirety* of interest — they are seized *per my* and not *per tout*; hence there is no survivorship among them.

The law of Hotchpot — “the word *seemeth* in English to mean a *pudding*, in which are put not one thing alone, but one thing with other things together” — was a metaphor used by our ancestors, denoting that the lands given in frank-marriage and those descending in fee-simple should be mixed and blended together, and then divided equally among the daughters, *if* the donee in frank-marriage so wished.

An estate in coparcenary may be dissolved by destroying any of its three constituent unities; as, by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending and vesting in one person, which brings it to an estate in severalty. (11)

NOTE 11. — Tenancies in coparcenary seldom, if ever, have been recognized in this country, and all joint estates by descent are regarded as tenancies in common.

An estate in common is where two or more persons hold lands, possibly by distinct titles and for distinct interests, but by unity of possession, because none knoweth his own severalty.

Tenants in common hold, therefore, by *unity of possession* (without survivorship, being seized *per my* and not *per tout*), but have no unity of title, time, or interest.

Tenancy in common may be created by the destruction of the constituent unities of the two former estates, or by special limitation in a deed.

They may take by purchase or descent, and are deemed to have several and *distinct freeholds*.

They are also compellable to make partition of their lands and to account for profits arising from the same.

Tenancies in common differ in nothing from sole estates but merely the blending and unity of possession. (12)

NOTE 12. — Estates in entirety are a further kind of joint estates and occur when an estate is conveyed to a man and his wife jointly. These estates differ from estates in joint tenancy in that the tenants are not seised of moieties, but both seised of the entirety *per tout*. This estate cannot be partitioned, but must descend to the surviving husband or wife.

All joint estates, except estates in entirety, may be divided among the joint tenants into estates in severalty. The act of so doing is called partition. Partition may occur in two ways: (1), by voluntary partition, where the tenants set off their respective shares and convey the same to each other by mutual conveyances; (2), compulsory partition, where one or more of the tenants brings suit to have the joint estate divided up between them into estates in severalty. If the estate may not be divided without great loss in value, the court will order it sold and partition the proceeds of the sale.

TITLE TO THINGS REAL, IN GENERAL. — A title is the means whereby a man has the just possession of his property.

The stages or degrees requisite to form a *complete title* are: *naked possession*, *right of possession*, and *right of property*, which, when united, form a complete or *legal title*.

Title to things real, or estates in lands and tene-

ments, are acquired or lost *by descent*, where the title is vested in a man by the single operation of the law; or *by purchase*, where the title is vested in him *by his own act* or agreement.

Title by descent, or *hereditary succession*, is where a man, on the death of his ancestor, acquires his estate by right of representation, as his heir at law. (18)

NOTE 18. — The *lex loci rei sitae*, or law of the jurisdiction where the real property is situated, regulates the descent of real property.

An ancestor is one that an inheritance of lands or tenements can be derived from only by his having had *actual seizin* of such lands, either by his own entry, or by the possession of his own or the ancestor's lessee for years; or by receiving rent from a lessee of the freehold; and, in incorporeal hereditaments, by his having what is equivalent to corporeal seizin.

An heir is he upon whom the law casts the estate immediately on the death of the ancestor.

Right heirs mean direct or lineal heirs.

Heir apparent is one whose right of inheritance is indefeasible if he outlive the ancestor.

Heir presumptive is one who, if the ancestor should die immediately, would, in the present circumstances of things, be the heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born. But he is not accounted an ancestor; who had only a bare right or title to enter or be otherwise seized.

An inheritance is the estate descending from the ancestor to the heir.

Affinity is relationship by marriage.

Consanguinity, or *kindred*, is the connection or relation of persons descended from the same stock or common ancestor. It is either *lineal* or *collateral*.

Lineal consanguinity is where one kinsman is descended, in a *direct* line, from the other.

Collateral consanguinity is where the kinsmen descend

THE RECKONING OF DEGREES OF KINDRED OR RELATIONSHIP

IS AS FOLLOWS:

I. — LINEAL.

CONSANGUINITY.	<i>Ascending.</i>	<ol style="list-style-type: none"> 1. Father, mother. 2. Grandfather, grandmother. 3. Great grandfather, great grandmother, and so on ad infinitum.
	<i>Descending.</i>	<ol style="list-style-type: none"> 1. Father, mother. 2. Son, daughter. 3. Grandson, granddaughter, and so on ad infinitum.
AFFINITY.	<i>Ascending.</i>	<ol style="list-style-type: none"> 1. Father-in-law, mother-in-law. 2. Step-father, step mother.
	<i>Descending.</i>	<ol style="list-style-type: none"> 1. Father-in-law, mother-in-law. 2. Son-in-law, daughter-in-law.

II. — COLLATERAL.

CONSANGUINITY.	<ol style="list-style-type: none"> 1. Brother, sister. 2. Brother's children, sister's children. 3. Uncle, aunt.
AFFINITY.	<ol style="list-style-type: none"> 1. Brother's wife, sister's husband. 2. Uncle's wife, aunt's husband.

from the same stock or common ancestor, but *not* in a *direct* line one from the other.

Degrees of relationship are computed by beginning at the common ancestor and reckoning *downwards*, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor — *that is the degree* in which they are related to each other. (14)

NOTE 14. — Blackstone here gives the canon and common law mode of computing collateral relationship. However, the mode of computation under the Roman or civil law is now more in vogue. This method is to count the number of generations between the deceased and the common ancestor, and down again to the descendant, whose relationship with the deceased is in question.

The rules of descent by the laws of England are as follows: —

Inheritances shall lineally *descend* to the issue of the person last actually seized, *in infinitum*, but shall never lineally ascend. (15)

NOTE 15. — By statute lineal heirs in the ascending series now inherit, if there be no lineal descendants, in preference to the collateral heirs.

The male issue shall be admitted before the female.

Where two or more males are in equal degree, the eldest only shall inherit, but the females all together.

The lineal descendants, *in infinitum*, shall represent their deceased ancestor — that is, shall stand in the same place as he himself would had he lived.

On failure of lineal descendants, the inheritance shall descend to the collateral relations of the blood of the first purchaser, subject to the three preceding rules, to evidence which blood there are two rules, viz.: —

The collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

A kinsman of the whole blood is he that is derived not only

from the same ancestor, but from the same couple of ancestors.

In collateral inheritances, the male ancestral stock shall be preferred to the female, unless the lands have descended from a female.

TITLE BY PURCHASE, or *perquisition*, is the possession of lands which a man hath by his own act or agreement, and not by the mere act of law, or by descent. It includes every other method of coming to an estate but that by inheritance. This embraces title by escheat, by occupancy, prescription, forfeiture, and alienation.

Title by escheat (signifying *chance* or accident) denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency, in which case the land naturally resulted back by a kind of reversion to the original grantor, or lord of the fee.

Escheat resulted from either natural or civil causes, as by the death of the tenant without heirs, or by his blood becoming attainted, etc.

The law of escheat is founded upon the principle that the blood of the person last seized in fee-simple is by some means utterly extinct or gone.

Title by occupancy is the taking possession of those things which before belonged to nobody.

This title was founded upon the rule of the ancient common law, that what belonged to nobody is given to the occupant by natural right.

The law of alluvion and dereliction — that is where land was *made* by the *washing up* of earth and sand by the sea, rivers, etc., and by the sea *shrinking back* below the usual water-mark — was, that if an island arose in the middle of a river, it belonged in common to the owners of the lands on each side of it; but if nearer to one bank than the other, it belonged to the proprietor of the nearest shore.

It was probably taken from the *civil law*.

This is termed title by accretion. An owner gains such a title when, in the case of alluvion, the particles of soil are grad-

ually attached to land already his. This is because the prior owner of these particles of soil is unable to identify them as his own. If, however, by some avulsion, or sudden act of nature a definite and distinguishable part of one man's land be attached to another's land, no title by accretion arises.

But if the *alluvion* or *dereliction* was sudden and considerable, it belonged to the King at common law, and by the civil law to the first occupant.

Jetsam is where goods are cast into the sea, and there sink and remain under water.

Ligan is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again.

Flotsam is where they continue swimming on the surface of the water.

Title by prescription is where a man can show no other title to what he claims than that he and those under whom he claims have *immemorially* used to enjoy it.

All prescription must be in a man and his ancestors, or in a man and those whose estate he hath, which last is called prescribing in a *que estate*.

Usage is *long* and *uniform practice*.

Custom is *local* usage that has acquired the *force* of law.

Prescription is immemorial *personal* usage — that is, usage beyond the "time of memory." (16)

NOTE 16. — Titles are no longer acquired by prescription. The place of this doctrine of the common law has been taken by the Statutes of Limitation, which declare that one who has held possession of property adversely for a given time acquires a title to the same.

The principal distinction between custom and prescription is, that one is *local*, and the other *personal*, usage.

Estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule; for, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition than as an acquisition *de novo*.

Nothing but incorporeal hereditaments can be claimed by prescription, as a right of way, a common, etc.

No prescription can give a title to lands and other corporeal substances of which more certain evidence may be had.

A prescription must always be laid in him that is tenant of the fee.

A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates.

For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe whose estate commenced within the remembrance of man.

A prescription cannot be for a thing which cannot be raised by grant, for the law allows prescription only in support of the loss of a grant which it presupposes to have existed.

If a man prescribes in a *que estate*, nothing is claimable but such things as are *incident*, *appendant*, or *appurtenant*, to lands.

Incident means depending upon, appertaining, or naturally relating or belonging to.

Appendant is where a right, or thing, is inseparably — from the very nature of it — *incident* to a grant.

Appurtenant rights or things arise from no such absolute or necessary connection, but only *may* be annexed or attached.

Title by forfeiture arises where a punishment is annexed by law to some illegal act, or negligence, in the owner or things *real*, as lands and tenements, whereby he loses all his interest therein, his estate being transferred to another, generally the injured party, who thus acquires the *title* to the same.

Forfeitures were occasioned by crimes, by alienation contrary to law, as in *mortmain*; by lapse, by simony, by non-performance of conditions annexed to estates, by waste, by breach of copyhold customs, and by bankruptcy.

Alienation in mortmain, or in *mortua manu*, was an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. This the statute *de*

religiosis, 7 Edward I., prohibited, and, to avoid the statute, the religious houses invented common recoveries.

Disclaimer is where a tenant disclaims to hold of his lord. This was a *civil crime*, and one of the crimes which occasioned forfeitures of lands upon reasons most apparently feudal.

Lapse is a forfeiture of the right of presentation to a vacant church by neglect of the patron to present within the time prescribed.

Simony is the corrupt presentation of any one to an ecclesiastical benefice, as for money, gift, or reward, whereby that turn becomes forfeited.

Waste is a spoil, or destruction, in any corporeal hereditaments, to the prejudice of him that hath the inheritance. Whatever does *lasting* damage to the freehold is *waste*.

It is either *voluntary*, which is a crime of *commission*, as pulling down a house; or it is *permissive*, which is a matter of *omission* only, as by suffering it to fall from want of repairs.

A bankrupt is a trader who secretes himself, or does certain other acts tending to defraud his creditors.

By *bankruptcy*, or the act of becoming a bankrupt, the *title* of all the estates of the bankrupt is transferred to the assignees of his commissioners, to be sold for the benefit of his creditors.

Title by alienation, conveyance, or purchase, comprises in its more limited sense any method whereby estates are transferred, or voluntarily resigned, by one man and accepted by another, whether by sale, gift, marriage-settlement, devise, or other transmission of property, by the mutual consent of the parties.

Originally this could not be done without the mutual consent of both lord and vassal.

All persons are *prima facie* capable of conveying and purchasing, unless the law has laid them under particular disabilities.

Conveyances and purchases by idiots, persons of non-sane memory, infants, and persons under duress, are *voidable*, but not actually void.

Common assurances of the kingdom, as they were called, are the legal evidences of alienation or transfer of property, whereby every man's estate is *assured* to him, and all controversies, doubts, and difficulties are either prevented or removed.

Assurances by common assurances are four kinds, viz. :

By deed, or matter *in pais*, which is an assurance transacted between two or more private persons *in pais* (in the country) — that is, according to the old common law, upon the *very spot*.

By matter of record, which is an assurance transacted only in public courts of record.

By special custom, obtaining in some particular places, relating to some particular species of property only.

By devise, as contained in the last will and testament of a decedent.

Alienation by deed, or *assurances by deed*, may be considered with reference to their general nature and their several species.

As to their general nature, they are regarded as the *solemn act* of the parties.

A deed is a writing, sealed and delivered by the parties. It may be a deed indented, or *indenture*, or a deed-*poll*.

An indenture is now only a *name* given to a species of deeds, though formerly, when deeds were more concise than at present, it was usual to write both parts of the deed (as they originally consisted of two parts or instruments) on the same piece of parchment, with some words or letters of the alphabet written between them, through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the words on one part and half on the other, but at length indenting only came into use.

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NOTE 17.— Under registration laws universally prevalent, every deed should be put on record in the jurisdiction where the land lies, and when done so the record is constructive notice of the conveyance to subsequent purchasers claiming under the grantor.

The legal, or formal and orderly, parts of a deed — that is, the words sufficient to specify the agreement and bind the parties — are: the premises, the *habendum*, the *tenendum*, the *reddendum*, the conditions, the warranty, the covenants, and the conclusion.

The premises in a deed are used to set forth the number and names of the parties, with their additions or titles, and description of things granted.

The *habendum* expresses what estate or interest is granted by the deed.

The *tenendum* — “and to hold” — is now of but little use, and only kept in by custom.

The *reddendum* is a reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as rent, or the like.

The conditions are clauses of contingency, on the happening of which the estate granted may be defeated.

The warranty is that clause or part whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted.

Warranties are *implied* or *expressed*, and *lineal* or *collateral*.

An implied warranty is such as the law presumes or concludes every grantor or vendor to make in disposing of

property ; as, for instance, that he has the *right* to make such disposition.

An express warranty in the transfer of lands and tenements is an *express clause* binding the grantor and his heirs ; it is a kind of covenant real. These express warranties were introduced to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir.

Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land warranted either from or through the ancestor who made the warranty.

Collateral warranty was where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor.

The covenants are clauses of agreement contained in the deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or give something to the other. (18)

NOTE 18. — The covenants used in modern deeds are : covenant for seisin, right to convey, against incumbrances, for quiet enjoyment and warranty.

A covenant real is where the covenanter covenants for himself and his *heirs*, upon whom it descends, and who are bound to perform it, provided they have assets by descent.

The conclusion of a deed mentions the execution and date of it.

Considerations are divided into *good* and *valuable*.

A good consideration is such as that of blood, or natural love and affection, as where a man grants an estate to a near relative.

A valuable consideration is such as money, marriage, or the like.

A deed takes effect only from its delivery. A deed without date is good if the date when it was executed or delivered can be proved.

Attestation is necessary rather for preserving the evidence than for constituting the essence of the deed.

If a man covenants, not only for himself and his heirs, but also for his executors and administrators, his personal assets, as well as his real, are likewise pledged for the performance of the covenant, which makes *such* a covenant better than any warranty.

A deed may be avoided by the want of any of the above mentioned requisites, or by subsequent matter, as erasure or alteration, defacing its seal, cancelling it, disagreement of those whose consent is necessary, or by judgment of a court of justice.

An escrow is a deed delivered to a third party, to hold as a *scrowl* or writing, that is not to take effect as a deed until some conditions be performed by the grantee.

As to the different species of deeds, some serve to *convey* real property, and others only to *charge* or *discharge* it.

Deeds serving to alien or convey real estate are called *conveyances*, which conveyances are either by common law or by statute.

Of conveyances by common law, some are *original* or *primary*, and others are *derivative* or *secondary*; the former are those by means whereof the benefit or estate is created, or first arises; and the latter, those by which the benefit or estate, already created, is *enlarged*, restrained, transferred, or extinguished.

The original or primary conveyances are: feoffment, gift, grant, lease, exchange, and partition.

The derivative or secondary conveyances are: release, confirmation, surrender, assignment, and defeasance.

A feoffment is the transfer or gift of any corporeal hereditament to another, perfected by *livery of seizin*, or delivery of bodily possession to the feoffee, without which no freehold estate therein could be created at common law. Strictly speaking, it refers to the conveyance of an estate *in fee*. He that so gives, or enfeoffs, is called the *feoffor*, and the person enfeoffed is denominated the *feoffee*. (19)

NOTE 19. — Feoffment by livery of seizin no longer exists.

Livery of seizin is the *feudal investiture*, or delivery of corporeal possession, of the land or tenement. It was either *in deed* or *in law*.

Livery in deed was performed by the feoffor delivering to the feoffee (all other persons being out of the ground) a clod, twig, or some part of it—as a ring, or latch, if a house—with the words, “I deliver these to you in the name of seizin of all the lands and tenements contained in this deed.”

Livery in law is where the same is not made *on* the land, but in *sight* of it only, the feoffor saying to the feoffee, “I give you yonder land; enter and take possession.”

A gift—*donatio*—differs in nothing from a feoffment but in the nature of the estate passing by it, being properly applied to the creation or conveyance of an estate-tail, as feoffment is to that of an estate in fee.

A grant—*concession*—is the regular method, by the common law, of conveying incorporeal hereditaments, or such things whereof no livery can be had. It is now used also in the transfer of real estate, the words “grant, bargain, and sell” being express covenants for title.

A lease is properly a conveyance, in consideration of *rent* or other recompense, of lands and tenements, for life, for years, or at will, but always for a less time than the lessor hath in the premises; for, if it be for the whole interest, it is more properly an *assignment* than a lease.

An exchange is the mutual conveyance of equal interests, the one in consideration of the other.

A partition is the division of an estate held in joint-tenancy, in coparcenary, or in common, between the respective tenants, each taking his distinct part to hold in severalty.

A release is the discharge or conveyance of a man's right in lands or tenements to another that hath some former estate in possession therein. It is the descending of a *greater* estate upon a *less*.

A confirmation is the conveyance of an estate or right *in esse*, whereby a voidable estate is made sure, or a particular

estate is increased, and the words of it are, "have given, granted, ratified, approved, and confirmed." It is of a nature nearly allied to a release.

A surrender is the yielding up of an estate for life or years to him that hath the immediate remainder or reversion wherein the particular estate *surrendered* may merge.

It is of a nature directly opposite to a *release*; for, as that operates by the greater estate descending upon the less, a surrender is the falling of a less estate into a greater. The words used are, "have surrendered, granted, and yielded up."

An assignment is the transfer, or making over to another, of the whole right one has in any estate; but usually in a lease, for life or years.

A defeasance is a collateral deed, made at the same time with the original conveyance, containing certain conditions, upon the performance of which *the estate created* may be defeated or undone.

Conveyances by statute depend much on the doctrine of *uses* and *trusts*, which, in their nature and origin, are the same, the old doctrine of *uses* being revived under the denomination of *trusts*.

A use or trust was a confidence reposed in another, who was *terre-tenant*, or tenant of the land, that he would dispose of the land according to the wishes of the *cestuy que use*, or *cestuy que trust*, to whose use it was granted, and suffer him to take the profits.

Uses and trusts originated in ecclesiastical ingenuity, the notion being transplanted from the civil law into England by the ecclesiastics, near the close of the reign of Edward III. (about 1370), to evade the statutes of *mortmain*, by obtaining grants of lands, not to religious houses *directly*, but to their *use*; thus distinguishing between the *possession* and the *use*. (20)

NOTE 20.—The great abuses which uses and trusts permitted caused the passage of the Statute of 27 Hen. VIII., Ch. 10, called the Statute of Uses, which attempted to abolish uses and trusts by transferring the legal title held by the feoffee to use to the *cestui que*

trust. But so popular were uses and trusts that by judicial construction the statute was held to operate and transfer the legal title to the holder of the equitable title in those cases only where the three following conditions existed: first, a person seised to a use and *in esse*; second, a cestui que trust *in esse*; and, third, a use *in esse*. The Statute of Uses does not operate on many varieties of uses, notably uses in chattel interests, a use upon a use, contingent uses, active uses or trusts, and uses to married women. Since the passage of the Statute of Uses the terms uses and trusts, which had theretofore been treated as synonymous, have been distinguished, and the term use is employed to designate those uses on which the statute operates, and the term trust, to designate those on which the statute does not operate. Trusts in this sense are active where the trustee has duties to perform,—passive, where he has none but merely holds the title. Trusts are also executed where all the limitations of the equitable interests are complete and final, and executory, where the limitations are not final, but remain to be perfected in the future. Trusts are also classed as express, implied, resulting and constructive; express, where they are created by some instrument in writing,—as distinguished from implied, resulting and constructive trusts which arise by construction of law. Implied trusts arise where land is so conveyed by the grantor that it inures to the benefit of a third party, but the grantor not having expressly created a trust for the third party, the law implies one. Resulting trusts arise by operation of law whenever a beneficial interest is not to accompany the legal title. Constructive trusts arise by operation of law, in cases of actual or legal fraud, from reasons of equity and justice, and independently of the intention of the parties.

Uses are not always to be executed at the time the conveyance is made; hence we have what are called *future uses*, which are as follows:—

Shifting or secondary uses take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be created by some person named in it.

Thus: If an estate be limited to A and his heirs, with a proviso that if B pay to A one hundred dollars by a given time, the use of A shall cease, and the estate go to B in fee, the estate is vested in A, subject to a shifting or secondary use in fee in B.

Springing uses are limited to arise on a future event,

where no preceding estate is limited, and they do not take effect in derogation of any preceding interest; as, if a grant be to A in fee, to the use of B in fee after the first day of January next.

Future or contingent uses are limited to take effect as remainders; as, if lands be granted to A in fee, to the use of B on his return from Rome. This is a future contingent use, because it is uncertain whether B will ever return.

Resulting uses are where the use limited by deed expires, or cannot vest, or was not to vest but upon a contingency, which has not happened, the use *results* back to the grantor.

There are also resulting trusts *implied* by law from the manifest intention of the parties and the nature and justice of the case; as, where an estate is purchased in the name of A and the price is actually paid at the time by B; here is a resulting trust implied by law in favor of B.

Contingent uses are subject to the same rules as contingent remainders.

Springing or contingent uses *differ* from an *executory devise* in that there must be a person seized to such uses at the time when the contingency happens, else they can never be executed by the statute; and, therefore, if the estate of the feoffee to such use be destroyed, by alienation or otherwise, before the contingency arises, the use is destroyed forever, whereas by an executory devise the freehold itself is transferred to the future devisee.

The statute of uses having transferred all uses into actual possession, or, rather, having drawn the possession to the use, gave birth to other species of conveyances, viz. : a covenant to stand seized to uses; a bargain and sale of lands enrolled; a conveyance by lease and release; deeds to lead or declare uses—that is, the use of other more direct conveyances; deeds to revocation of uses.

A covenant to stand seized to uses is that by which a man covenants that, in consideration of blood or marriage, he will stand seized of lands to the use of another; as, to the use of his child, wife, or kinsman.

On executing the covenant the other party becomes seized of the use of the land, and the statute of uses immediately operates by annexing the possession to the use, or, as it is called, "executes" at once the use or estate.

Deeds of revocation of uses were the execution of a *power reserved* at the creation of the use of recalling at a future time the use or estate so created.

These last species of conveyances owe their operation principally to the statute of uses.

In time *trusts* superseded, or were made to answer, in general, all the beneficial ends or purposes of *uses*, without their inconveniences or frauds.

A *trust*, in the general and enlarged sense, is a *right* on the part of the *cestuy que trust* to receive the profits and dispose of the lands in equity.

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In time trusts superseded, or were made to answer, in general, all the beneficial ends or purposes of uses, without their inconveniences or frauds.

A trust, in the general and enlarged sense, is a right on the part of the *cestuy que trust* to receive the profits and dispose of the lands in equity.

They are two kinds: *executed*, when either the legal or equitable title passes; or *executory*, when it is to be perfected at some future time, by conveyance or settlement.

No particular form is requisite to create a trust; it is sufficient if the terms of the trust can be duly ascertained by the writing.

The courts now consider a trust estate as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subjected to in law.

Deeds which do not convey, but serve only to charge or discharge real property, are: obligations or bonds, recognizances, and defeasances.

A bond or obligation is a deed whereby a person, the obligor, obligates himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed.

The penal sum, or penalty, attached to the bond for its

breach or forfeiture is usually drawn for double the amount of the bond or money borrowed, in order to cover the principal, interest, expense, and damages sustained from non-performance of the covenants, which is all that is now recoverable upon forfeiture of a bond, no matter what the amount of the penal sum, or penalty, inserted. Formerly the whole penalty was recoverable at law.

A recognizance is an obligation of *record*, entered into before some court of record or magistrate duly authorized, with condition to do some particular act; as, to appear at court, to keep the peace, etc.

Another distinction between a recognizance and a bond is, that a *bond* is a creation of a fresh debt or obligation *de novo*, while a *recognizance* is the acknowledgment of a *former* debt upon record.

A defeasance upon a bond, recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, and discharges the estate of the obligor.

Alienation by matter of record. — These assurances or conveyances are such as do not depend entirely on the act or consent of the parties themselves, but are where the sanction of some court of record is called in to substantiate and witness the transfer of real property. They are: private acts of Parliament, the King's grants, fines, and common recoveries.

Private acts of Parliament, as a *species of assurances*, are such as, by the transcendent authority of Parliament, are calculated to give such reasonable powers of relief as are beyond the reach of the courts or ordinary course of law.

A fine of lands or tenements, also called an acknowledgment of a feoffment of record, is an amicable composition or agreement of a suit, either actual or fictitious, by leave of the King or his justices, whereby the estate or lands in question are acknowledged to be the right or property of one of the parties. (21)

NOTE 21. — Fine of lands and common recovery do not now exist.

The force and effect of fines, when levied by such as have themselves any interest in the estate, are to assure the lands in question to the cognizee by barring the respective rights of parties, privies, and strangers.

Fines are of equal antiquity with the first rudiments of the law, instances having been produced of them even prior to the Norman invasion.

Their origin was founded on an actual suit commenced at law for the recovery of the possession of land or other hereditaments, and the possession gained by composition, which possession thus acquired was found to be so sure and effectual that fictitious actions were often commenced to obtain the same security.

A *fine* is so called because it puts an end, not only to the suit thus commenced, but also to all other kinds of suits and controversies concerning the same matter.

A common recovery was so far like a fine that it is a suit, either actual or fictitious, for lands, brought against the tenant of the freehold, who thereupon vouches another, who undertakes to defend the tenant's title, but upon such vouchee's *making default*, the land is recovered by judgment at law against the tenant, who, in return, obtains judgment against the vouchee to recover lands of equal value in recompense. This supposed adjudication of the right binds all persons, and vests a free and absolute title, or fee-simple, in the recoveror.

They were invented by the ecclesiastics to elude the statutes of *mortmain*, the religious houses setting up a fictitious title to the land which it was *intended* they should have, and brought an action to recover it against the tenant, who, by fraud and collusion, made no defense, and judgment being thereby given to the religious houses, they "*recovered*" the land, by sentence of law, upon a supposed prior title.

These *common recoveries*, thus originally invented by the ecclesiastics to elude the statutes of *mortmain*, were afterwards encouraged by the finesse of the courts of law of Edward IV., in order to put an end to all fettered inheritances, and bar not only estates-tail, but also remainders and reversions

expectant thereon, which was the force and effect of a *recovery*, provided the tenant in tail suffers, or is vouched in, such recovery; for it was found that these *estates-tail* were of such great inconvenience, by tying up the landed property and creating perpetuities, that, in order to unfetter them, common recoveries were encouraged by the judges, and by their use all limitations upon *estates-tail* were removed, and an absolute and pure fee-simple passes as the legal effect.

These common recoveries are considered simply in the light of a *conveyance on record*, invented to give a tenant in tail an absolute power to dispose of his estate as freely as if he was tenant in fee-simple. It is the only mode of conveyance by which a tenant in tail can effectually dock the entail, for by *fine* he only bars his issue, and not subsequent remainders and reversions.

By statute, *fin*es and common recoveries are swept away both in England and in this country.

Alienation by special custom is confined to those conveyances or assurances by special custom that include the transfer of *copyhold* lands and such customary estates as are holden in ancient demesne, or manors of a similar nature.

This is effected by *surrender*, which is the giving up of the estate into the hands of the lord for the purposes expressed in the surrender.

Of assurance by surrender, the several parts are: *surrender* by the tenants into the hands of the lord, to the use of another, according to the custom of the manor; *presentment* by the tenants, or homage, of such surrender; and *admittance* of the surrenderee by the lord, according to the uses expressed in such surrender.

Alienation by devise is the method contained in a man's last will and testament of disposing of lands and tenements.

It is also styled a *revocable* assurance, *posthumously* disposing of property or the custody of children.

Before the conquest, lands were devisable by will in England, but, upon the introduction of the military tenures, the

restraint upon devising lands naturally took place as a breach of the feudal doctrine of non-alienation without the consent of the lord, and so it stood at common law until again authorized by the statute of wills, 84 Henry VIII., and subsequently made more universal by the statute of tenures, 29 Charles II.

A will is a disposition of real and personal property, to take effect after the death of the testator.

Will and *devise* are generally considered and used as synonymous; but when the will operates on personal property only it is called a *testament*, and when upon real estate only, a *devise*. Where the instrument disposes of *both* real and personal property it is usually denominated "the last will and testament."

Testaments of personal property or chattels operate upon whatever the testator dies possessed of, but *devises* only upon such real property or lands as were his at the time of executing and publishing his will. (22)

NOTE 22. — At present a devise is held to cover real estate acquired by the testator after executing and publishing his will as well as what he possessed at the time of doing so.

Wills or devises must be in writing, signed by the testator, or some person in his presence by his direction, and be subscribed by two or more witnesses in his presence and in the presence of each other.

In construing wills or devises, and deeds of common assurances the general rules and maxims, as laid down by the courts, are as follows: —

That the construction be favorable, and as near the minds and apparent intentions of the parties as the rules of law will admit; therefore, the construction must be reasonable and agreeable to common understanding.

THINGS PERSONAL, or chattels. — Under this name are included all sorts of things movable which may attend a man's person wherever he goes, which includes whatever wants the duration or the immobility attending things real. They

also include something more, the whole being comprehended under the general name of *chattels*.

Things personal, or chattels, may be considered with reference to their *distribution*, the *property therein*, and the *title* to them.

AS TO THEIR DISTRIBUTION, chattels are divided into *chattels real* and *chattels personal*.

Chattels real are such as concern or savor of the realty, and are so styled as being interests issuing out of, or annexed to, *real estate*, and of which they have one quality, viz.: *immobility*, which denominates them real, but want a sufficient legal determinate *duration*, which constitutes them *chattels*, as a lease for a term of years, a mortgage, and the like.

Chattels personal are, properly and strictly speaking, *movables*, which may be annexed to, or attend on, the person of the owner wherever he goes.

Property in things personal, or chattels, is either in *possession*, as where a man has not only the right, but the actual enjoyment, of the thing; or in *action*, where a man has only a bare right, without occupation or enjoyment — called a *thing* or *chose in action*, being recoverable by action at law.

A thing or chose in action is defined to be a thing incorporeal, or a *right*, as an annuity, money due on a bond, etc.

Property in possession is *absolute* or *qualified*.

Absolute property is where a man has such an exclusive right in the thing that it cannot cease to be his without his own act or default.

Qualified property is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist, which latter may arise where the subject is incapable of absolute ownership, or from the peculiar circumstances of the owners.

Limitations of personal goods and chattels, in remainder, *after* a bequest for life, are allowed in last wills and testaments.

Things personal may belong to their owners, not only in severalty, but in joint-tenancy, and in common also, as well as real estates, but not in coparcenary, because they do not descend from the ancestor to the heir.

Stock used in a joint-undertaking, as by way of partnership in trade, is always considered as *common*, and not as *joint* property, and there shall be *no* survivorship therein.

Title to things personal may be *acquired* or *lost* by occupancy, prerogative, forfeiture, custom, succession, marriage, judgment, gift or grant, contract, bankruptcy, testament, and by administration.

Title by occupancy is that which still gives to the first occupant a *right* to those few things which have no legal owner, or are incapable of permanent ownership, such as *goods captured* from alien enemies, *things found*, the *benefit of the elements*, *animals wild* by nature, *emblems*, things gained by *accession*, things gained by *confusion*, *literary property*, *inventions*, etc.

The right of taking goods of alien enemies is restrained to such captors as are authorized by the public authority of the State.

Movables found upon the earth or in the sea, unclaimed by any owner, are supposed to be abandoned by the last proprietor, and therefore belong, as originally in a state of nature, to the first occupant or fortunate finder.

The benefits of the elements — the light, the air, the the water, etc. — thus, too, only can be appropriated.

Animals *feræ naturæ*, or wild by nature, all mankind has a right to pursue and take by the original grant of the Creator, which natural right still continues unless where restrained by law.

Emblems must be referred to this principle of occupancy also. They are subject to many, though not all, the incidents attending personal chattels. They are not the object of *larceny* before they are severed from the ground.

Accession, by natural or artificial means, as the *growth* of vegetables, the pregnancy of animals, embroidering of cloth,

the conversion of wood or metal into utensils, etc., is a doctrine of property also grounded upon this principle.

Confusion of goods also — as where the goods of two persons are indistinguishably intermixed — the English and civil law essentially agreeing that, if the mixture be by mutual consent, the proprietors have each an interest in common in proportion to their respective shares. But where one willfully intermixes his own with that of another, without his knowledge or approbation, the law, to guard against fraud, gives the entire property to him whose original domain is invaded.

A copyright, or patent, is a right or property which a person has in his own original composition or invention, and, being grounded on labor and inventive skill, is properly reducible to this head, *occupancy* itself being supposed to be founded on *personal* labor — ancient wells being the acknowledged property of the diggers of them, while the land thereabout was still in common.

The *identity* of a literary composition consists entirely of the sentiment and the language.

Title by prerogative is a method of acquiring property in personal chattels by the King's *prerogative*, whereby a right may accrue; either to the Crown itself or to such as claim under the title of the Crown, as by the King's grant; or by prescription, which supposes an ancient grant.

Title by forfeiture is that whereby a title to goods and chattels may be acquired or lost as a punishment for some crime or misdemeanor, and a compensation for the offense and injury to the party injured — such as treason, felony, manslaughter, and *præmunire*.

Title by custom is that whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom, as heriots, mortuaries and heirlooms.

Heriots are a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the tenant or owner of the lands. It now consists of the best live beast the tenant

dies possessed of, or sometimes the best inanimate good, as a jewel or piece of plate, but it is always a personal chattel.

Heriots are of Danish origin, and a relic of villein tenure. They are either *heriot service* or *heriot custom*.

Heriot service amounts to little more than a mere *rent*; it is due upon a special reservation in a grant or lease of lands.

Heriot custom depends merely upon immemorial usage and custom, and arises upon no special reservation whatsoever.

Mortuaries are a sort of *ecclesiastical* heriots, being a customary gift claimed by and due to the minister, in many parishes, on the death of his parishioners.

Heir-looms — *loom*, of Saxon origin, signifying a *limb* or member of the inheritance — are such goods and chattels as, contrary to the nature of chattels, shall go, by special custom, to the heir, along with the inheritance, and not to the executor of the last proprietor; as crown jewels, charters, deeds, court-rolls, chests containing them, monuments, tombstones, and coats-of-arms,

Heir-looms by special custom are sometimes carriages, utensils, and other household implements, but such custom must be *strictly* proved.

Heir-looms by general custom are whatever is strongly affixed to the freehold or inheritance, and cannot be severed from it without violence or damage.

Title by succession is that by which one set of men may, by succeeding another set, acquire a property in their goods and movables. In strictness of law, this applies to corporations aggregate and such corporations sole as are the heads and representatives of bodies aggregate; for, in judgment of law, a corporation never dies.

Title by marriage is where chattels and personal property belonged *formerly* to the wife, but which, on *marriage*, are, by act of law, vested absolutely in the husband, with the same degree of property and with the same powers as the

wife, when sole, had over them, *provided* he reduces them to possession.

The paraphernalia of the wife, which consists of her apparel and ornaments, suitable to her rank and degree, she acquires a property in by marriage.

Title by judgment is where, in consequence of some suit at law, a man may in some cases not only *recover*, but originally *acquire*, a right to personal property; as, to *penalties*, recoverable by an action popular; *damages*, given to a man by a jury, as compensation and satisfaction for some injury sustained; and *costs* of suit.

Title by gift or grant is acquired in chattels by the voluntary conveyance of them to another, in writing or by word of mouth, the strongest evidence of which is the *delivery* of them into the possession of the person to whom given. A true or proper gift or grant is always accompanied with delivery of possession, and takes effect immediately.

Gifts are always gratuitous.

Grants are upon some consideration or equivalent.

Under the head of gifts or grants of chattels *real* may be included all leases of lands for years, assignments and surrenders of those leases, and all other methods of conveying an estate less than freehold.

Title by contract *usually* conveys an interest merely in action.

A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing.

Contracts may be either *express* or *implied*, and *executed* or *executory*.

Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making.

Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.

Executed contracts are such in which the right and the possession are transferred *together*; they convey a *chose* in possession.

Executory contracts are such in which the *right only* is transferred; they convey a *chose* in action.

A **nudum pactum**, or *naked compact*, is an agreement to do or to pay anything on one side without any compensation or consideration. It is totally void in law.

The most usual species of personal contracts are: sale or exchange, bailment, hiring, borrowing, and debt.

Sale or exchange is a transmutation of property from one man to another in consideration of some price or recompense in value.

An **exchange** is where it is a commutation of goods for goods.

A **sale** is where it is a transfer of goods for money.

There is an *implied* warranty annexed to every sale that the seller sells them as his own, or has authority to sell them; and if the title proves defective, a purchaser of goods and chattels may have satisfaction from the seller.

BAILMENT—from the French *bailler*, to deliver—is a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully performed by the bailee.

Bailments are divided into five sorts, viz.:—

Depositum, or *deposit*, where the property bailed is to be kept by the bailee, for no particular purpose, without recompense. In this case the bailee must exercise *ordinary* care.

Mandatum, or *commission*, is where the bailee undertakes to do something to, or simply carry, the bailment, *without* recompense. Here the bailee must use a degree of diligence and care adequate to the undertaking.

Commodatum, or *loan for use*, is where the property is intrusted to the bailee without pay, to be used by him, for his own benefit. In this case the bailee must use more care than in either of the preceding cases.

Pignori acceptum, or *pawn*, is the bailment of a thing as a security for a debt. This bailee must use the same care as in the preceding cases.

Locatum, or hiring, is a bailment for reward, by which

the hirer gains a temporary qualified property in the thing hired, and the owner acquires an absolute property in the stipend or price. Here the bailee must use due care and diligence.

Locatum is subdivided into three classes, viz. : —

Locatio rei, or hiring, by which the hirer gains a temporary use of the thing.

Locatio operis faciendi, where something is to be done to the thing bailed.

Locatio operis mercium vehendarum, where the thing is merely to be carried from one place to another.

Hiring and borrowing are contracts whereby the possession and a transient qualified property in chattels is transferred, for a particular time or use, on condition that the identical goods be restored at the time appointed.

Hiring is always for a price, stipend, or recompense.

Borrowing is merely gratuitous.

This *price*, being calculated to compensate for the *inconvenience, risk, or hazard*, of loaning, gives birth to the doctrine of *interest, usury, bottomry, respondentia, and insurance*.

Interest is a moderate and legal profit allowed money-lenders to recompense them for the *inconvenience* of parting with money.

Usury is an *exorbitant* and *illegal* profit taken by money-lenders.

Sometimes the *hazard* may be greater than the rate of interest allowed by law will compensate, which gives rise to certain practices and *exceptions* to the general rule of law regarding and limiting interest rates, viz. : —

Bottomry is in the nature of a mortgage of a ship, whereby the owner or master raises money to enable him to carry on his voyage, and pledges the keel or bottom of the ship as security.

If the ship is lost, the lender loses his money; but if it returns, he receives back his principal and also the premium or interest agreed upon, however it exceed the ordinary and legal rate of interest.

If there be more bottomry loans than one upon the ship, then, contrary to the principle of priority in payment of mortgages on land, here the *last* loan is entitled to be paid *first*, on the principle that the latter loans, by preserving the ship, have saved the earlier ones.

Respondentia is where the loan is not upon the vessel, but the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage. Here only the borrower personally is bound to answer the contract, and, therefore, said to take up money at *respondentia*.

Insurance is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or *insure* him against a particular event.

It is founded upon one of the same principles as the doctrine of interest upon loans — that of *hazard*, but not that of inconvenience.

Debt, as a species of personal contract, is any contract whereby a certain sum of money becomes due to the creditor.

Any contract whereby a determinate sum of money becomes due to any person and is not paid, but remains in *action* merely, is a *contract of debt*.

Debt, therefore, is a species of contract whereby a chose in action, or a right to a certain sum of money, is mutually acquired and lost.

Debts are generally divided into debts of *record*, debts by *special contract*, and debts by *simple contract*, which latter includes *paper credit*.

A debt of record is a sum of money which appears to be due by the evidence of a court of record.

A judgment is a *contract* of the highest nature, being established by the sentence of a court of judicature.

Debts by *specialty*, or *special contract*, are such whereby a sum of money becomes due, or is acknowledged to be due, by deed or instrument under seal.

A written agreement, not under seal, is classed as a *parol* or *simple contract*, and is usually considered as such, just as much as any agreement by mere word of mouth.

Debts by simple contract are such where the contract upon which the obligation arises is ascertained by mere *oral* evidence, the most simple of any; or by notes unsealed, which are capable of more easy proof, and, *therefore, only* better than verbal promise.

Paper credit consists of simple contract debts by bills of exchange, promissory notes, etc.

Bills of exchange, or *drafts*, are open letters of request from one man to another, desiring him to pay a sum named therein to a third person, on his account.

The writer is called the *drawer*; the person to whom written, the *drawee*; and the party to whom payable, the *payee*.

They are either *foreign* or *inland*, and the law upon both is essentially the same.

Promissory notes, or *notes of hand*, are a plain and direct engagement in writing to pay a sum specified, at the time limited, to a person named, or sometimes to his order, or to the bearer at large.

Paper credit may be transferred or assigned, contrary to the general rule of the common law that no chose in action is assignable, which assignment is the *life* of paper credit. It is done by the payee writing his name, *in dorso*, or on the back of it, thereby assigning over his whole property in it to another, called the indorsee, who may assign it to another, and so on *ad infinitum*.

Acceptance is a contract by the drawee to pay the bill, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment; for, in order to make himself liable, he must *accept* the bill, either verbally or in writing.

Protest is *legal* notice of *dishonor* to prior parties.

The *object* of protest is to fix the responsibility of prior parties; for, in the absence of such notification, the loss falls on the holder of the bill. A bill dishonored or refused must be demanded of the *drawer* as soon as possible. in order to fix his responsibility.

Title by bankruptcy is that method by which a right is acquired to the property of a bankrupt; for, immediately upon the act of bankruptcy, the property of the bankrupt's personal estate is vested, by construction of law, in the assignees, and they, when they have collected the whole or converted it into money, distribute it, by equal proportional dividends, among the creditors.

Assets are whatever goods and chattels of a bankrupt may be converted into money.

Title by testament is the method of acquiring personal property according to the express directions of the deceased proprietor, which we call a *testament*.

Title by administration is the method of acquiring personal property also according to the will of the deceased proprietor — not expressed, indeed, but *presumed* by law — which we call *administration*.

A **testament or will** is the legal declaration of a man's intentions, which he *wills* to be performed after his death.

They are *written* and *verbal*, or *nuncupative*, the latter depending on oral evidence, being declared by the testator *in extremis*, before a sufficient number of witnesses, and afterwards reduced to writing.

Testaments are of very high antiquity, being found among the ancient Hebrews, and have existed in England immemorially, whereby the deceased was at liberty to make this predisposition of his estate, dividing it into three equal parts: one to his wife, and one to his heirs or lineal descendants, called their *reasonable parts*; the other was entirely at his own disposal, and, in disposing of which, he was bound, by custom, to remember his lord and the church, by leaving them his two best chattels, which was the origin of *heriots* and *mortuaries*.

An **intestate** is one deceased who has made no such disposition of his goods as were testable.

Generally speaking, all persons may make wills, unless for want of sufficient *discretion*; as those *non compos mentis*, male *infants* under the age of fourteen, and females under twelve,

etc. ; for want of sufficient *liberty* and *free will*, or on account of *criminal conduct*.

A *codicil* is a supplement to a will, or an addition made to it, by the testator.

It annexes to, and must be taken as a part of, the testament, being for its explanation, alteration, or to make some addition to, or subtraction from, former dispositions of the testator. This may also be either written or nuncupative.

No testament is of any effect till after the death of the testator.

A testament may be avoided if made by a person laboring under any of the *incapacities* before mentioned.

Also, by making another testament of a *later date*, which annuls all former ones ; and, if the last will is but the republication of a former one, it still annuls everything preceding it, and establishes the original or former one again.

Also, by *cancelling* or *revoking* it, which a testator may always do, no matter how strong or irrevocable the terms he may have formerly used therein, for no one's acts or words can alter the disposition of law.

Marriage or the *birth of a child*, is by law construed to be the revocation of a will.

An executor is he to whom another commits, by will, the execution of his last will and testament.

An executor *de son tort* is one who acts as executor without just authority. He is liable to all the trouble of an executorship without any of the profits or advantages.

An administrator is, in effect, an executor appointed by law — that is, he is one appointed by the court to administer upon the goods and effects of a person dying *intestate*.

Administration *de bonis non* is where the course of representation or administration being *interrupted*, it is necessary to commit administration afresh of the goods of the deceased not administered by the former executor or administrator.

Administration *cum testamento annexo* is where there is no executor named in the will, or if any incapable person be named, or a person named refuses to act.

The ~~offices~~ offices and duties of executors and administrators are in general much the same, except that the former are ~~bound~~ bound to follow the *will*, which the latter are not; and an executor may do many acts before he proves the will, but an administrator can do nothing till letters of administration are granted.

The interests vested in an executor by the will of the deceased may be continued and kept alive by the will of the *executor*, because the power of an executor is founded upon the special confidence and actual appointment of the *deceased*; hence he is allowed to transmit that power to another in whom he has equal confidence; but with an administrator it is otherwise, for he is merely the appointee or officer of the *law*.

The powers and duties of executors and administrators, who are also called *personal representatives*, are: to bury the deceased in a suitable manner, to prove his will, make and swear to an inventory of goods and chattels, whether in possession or *action*, collect the same, pay deceased's debts, next legacies, and then the *residuum* to the residuary legatee, or, if none, to next of kin.

Debts of the deceased must be paid in the following order of priority: funeral charges, expenses of proving will, and the like; debts due to the King or State, on record or specialty; debts preferred by statute; debts of record, as judgments, statutes, and recognizances; debts on specialties, as rents, bonds, and covenants; debts on simple contracts, as notes unsealed and verbal promises.

A legacy is a bequest or gift of goods and chattels by testament; the assent of the executor is necessary to its perfection, and the person to whom it is given is styled the *legatee*.

Legacies are *vested* or *contingent*.

A contingent legacy, if it be left to one *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that time, is a *lapsed* legacy.

Vested legacies are legacies to one *to be paid* when he attains the age of twenty-one, and if the legatee dies before

that time it goes to his representatives. It is an interest commencing *in present*.

If the legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*.

A *donatio causa mortis* is a deathbed gift or disposition of property — that is, when a person, in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered, to another the possession of any personal goods to keep in case of his decease.

It needs not the assent of his executor, yet it shall not prevail against creditors, and is accompanied with this *implied* trust, that if the donor lives, it shall revert to him being only given in contemplation of death.

BOOK III.

PRIVATE WRONGS.

ANALYSIS OF BOOK III.

Private wrongs, for which the laws of England have provided redress:

- { 1. By the mere act of the parties,
- { 2. By the mere operation of law,
- { 3. By both together, or suit in courts; wherein
 - 1. Of courts; and therein of
 - { 1. Their nature and incidents,
 - { 2. Their several species, viz.:
 - 1. Of public or general jurisdiction; as
 - { 1. The court of common law and equity,
 - { 2. Ecclesiastical courts,
 - { 3. Military courts, and
 - { 4. Maritime courts.
 - 2. Of private or special jurisdiction.
 - 2. Of the cognizance of wrongs; in the courts
 - { 1. Ecclesiastical,
 - { 2. Military,
 - { 3. Maritime, and
 - { 4. Of common law courts; wherein
 - 1. Of the respective remedies and INJURIES affecting
 - 1. The rights of private persons;
 - { 1. Absolute, or
 - { 2. Relative.
 - 2. The rights of property
 - 1. Personal.
 - { 1. In possession; by
 - { 1. Dispossession, or
 - { 2. Damage.
 - 2. In action; by breach of contracts.
 - 2. Real; by
 - 1. Ouster, or dispossession; of
 - { 1. Freeholds, or
 - { 2. Chattels real.
 - 2. Trespass,
 - 3. Nuisance,
 - 4. Waste,
 - 5. Subtraction,
 - 6. Disturbance.
 - 3. The rights of the Crown.
 - 2. Of the pursuit of remedies; for wrongs and injuries
 - 1. By action of common law; wherein of
 - 1. Original,
 - 2. Process,
 - 3. Pleading,
 - 4. Demurrer and issue,
 - 5. Trial, by
 - 1. Record,
 - 2. Inspection,
 - 3. Witness,
 - 4. Certificate,
 - 5. Wager of battle,
 - 6. Wager of law,
 - 7. Jury.
 - 6. Judgment,
 - 7. Appeal,
 - 8. Execution.
 - 2. By proceedings in the courts of equity.

BOOK III.

PRIVATE WRONGS.—Wrongs are the privation of right, and are divisible into *private* wrongs and *public* wrongs.

Private wrongs are an infringement or privation of the private or civil rights of *individuals*, and are frequently termed *civil injuries*.

Public wrongs are a breach and violation of public rights and duties, which affect the whole *community*, and are distinguished by the appellation of *crimes* and *misdemeanors*.

The remedy for **private injuries** is by application to courts of justice—that is, by *civil suit* or *action*—for which purpose courts of justice are instituted, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined and wrongs prohibited.

This *redress* of private wrongs or civil injuries may be effected by the mere act of the *parties*, by mere operation of *law*, or by both together, or *suits* in court.

Redress by act of the parties is of two kinds, viz. : that by act of the injured party *only*, and that by joint act of *all* the parties.

Redress by the sole act of the party injured is by *defense* of one's self or relations; by *recaption* of goods; by entry on lands and tenements, to oust intruders; by *abatement* of nuisances without riot; by *distress*, for rent, damages, amercements, etc.; and by *seizing of heriots*.

Self-defense is justly called the *primary* or *first law of nature*, and is not, nor can it be, taken away by the law of society. It is held an excuse for breaches of the peace, and even homicide itself.

Recaption happens when any one hath deprived another of

his property in goods or chattels, and the owner claims and takes them wherever he happens to find them.

A nuisance is anything that worketh hurt, inconvenience, or damage, or unlawfully annoys another.

Distress is the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure satisfaction for the wrong committed.

A man's tools and utensils of trade cannot be distrained, nor things which cannot be rendered again in as good plight as when distrained.

Replevy—*replegiare*—i. e., to take back the pledge—is when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession upon giving security to try the *right* of taking it.

Redress by joint act of all the parties is by *accord* and *arbitration*.

Accord is a satisfaction *agreed* upon between the party injured and the party injuring, which, when performed, is a bar of all actions on this account.

Arbitration is where the parties submit all matters in dispute to the judgment of two or more arbitrators.

Redress by the mere operation of law is by *retainer* and *remittitur*.

Retainer is where a creditor is executor or administrator, and the law permits him to *retain* his own debt before other creditors in equal degree; otherwise, he must sue himself, which would be an absurdity, and leave him in a worse condition than other creditors.

Remittitur is where one has the true property in lands, but is out of possession thereof, and has no right to enter without recovering possession in an action—hath afterwards the freehold *cast* upon him by some subsequent, and, of course, defective, title; in this case he is *remitted* or sent back by operation of law to his ancient and more certain title.

Redress effected by act of both law and the parties is by *suit* or action in the *courts* of justice, wherein may be con-

sidered the *courts themselves* and the *cognizance of wrongs or injuries* therein.

Of courts in general, we may consider their *nature* and *incidents*, and their several *species*.

THEIR NATURE AND INCIDENTS. — A court is a place wherein justice is judicially administered.

Incidents, or *constituent parts*, to all courts are plaintiffs, defendants, judge, attorneys, etc.

Courts are either of *record* or *not of record*.

A court of record is that where the acts and judicial proceedings are enrolled or *recorded* for a perpetual memorial and testimony, which rolls are called the *records* of the court, and are of such high and supereminent authority that their truth cannot be called in question.

A court not of record is the court of a private man, whom the law will not intrust with any discretionary power, as courts baron and other inferior jurisdictions.

An attorney is one who is put in the place, stead, or turn, of another, to manage his matters of law.

It is a general rule that where there is a *legal right* there is also a *legal remedy*, by suit or action at law, whenever that right is invaded.

A suit or action is the lawful demand of one's right.

It is an ordinary *proceeding* in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

Fictions *in law* are those things that have no real essence in their own body, but are acknowledged and accepted in law for some special purpose. They are highly beneficial and useful, as the maxim is ever invariably observed that no fiction shall extend to work an injury, its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.

AS TO THEIR SPECIES. — Courts are of a *public* or *general jurisdiction*, or of a *private* or *special jurisdiction*.

Courts of a public or general jurisdiction are: the

Courts of Common Law and Equity, the Ecclesiastical Courts, the Military Courts, and the Maritime Courts.

The Courts of Common Law and Equity are: the Court of *Piepoudre*, the Court Baron, the Hundred Court, the County Court, the Court of Common Pleas, of King's Bench, of Exchequer, of Chancery, of Exchequer Chamber, and the House of Peers, to which may be added, as auxiliaries, the Courts of Assize and Nisi Prius.

The Court of *Piepoudre*, so called from the dusty feet of the suitors, is a court of record incident to every fair and market. They are instituted to do justice expeditiously among the variety of persons that resort from distant places to a fair or market. It is the lowest court.

The Court Baron is a court incident to every manor of the kingdom, to be holden by the steward within the said manor.

A Hundred Court is only a larger Court Baron, being held for all the inhabitants of a particular hundred instead of a manor.

A County Court is a court incident to the jurisdiction of the sheriff.

A Court of Common Pleas is for the trial of all matters of law arising in civil cases, whether real, personal, or mixed, and compounded of both.

Pleas or suits are of two sorts: *pleas of the Crown*, which comprehend all crimes and misdemeanors wherein the King (on behalf of the public) is the plaintiff; and *common pleas*, which include all *civil* actions depending between subject and subject.

In this court only can *real* actions be originally brought, and all other or personal pleas between man and man, this court sitting to hear and determine all matters of *law* arising in *civil* causes, whether *real*, *personal*, or *mixed*.

The Court of King's Bench, so called because the King used formerly to sit there in person, is the *supreme court of common law* in the kingdom.

The Court of Exchequer is a court of inferior rank to

that of the King's Bench or Common Pleas, and is intended principally to order the revenues and collect the debts and duties of the Crown.

The High Court of Chancery is, in matters of civil property, the most important of any of the King's superior and original courts of justice, and derives its name from the judge or lord *chancellor*, who presides over it.

The Court of Exchequer Chamber is only a court of appeal to correct the errors of other jurisdictions.

The House of Peers is the *supreme court of judicature* in the kingdom; it has no original jurisdiction, but only upon appeals and writs of error.

The Courts of Assize and Nisi Prius are composed of two or more commissioners, who are twice every year sent by the King all over the kingdom to try certain cases by *jury*, etc.

The Ecclesiastical Courts were various, and exercised jurisdiction over such ecclesiastical matters in which it was supposed the Court of Rome, or the Pope, had proper or rightful preference. They are not courts of record.

The *Ecclesiastical* and *Lay* Courts were first separated by William the Conqueror. In the times of our Saxon ancestors there was no distinction between them.

The Military Courts are also not courts of record, and the only permanent one is that of *chivalry*, the courts *martial* annually established by act of Parliament being only temporary.

The Maritime Courts are the Courts of Admiralty and their courts of appeal. They have power and jurisdiction to determine all maritime injuries arising upon the seas.

Like the Ecclesiastical Courts, the proceedings in these courts are according to the method of the civil law, and they are not courts of record.

Courts of a private or special jurisdiction are those whose jurisdictions are private and special, confined to *particular spots*, or instituted to redress only *particular injuries*.

These particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly

restrained, and cannot be extended further than the express letter of their privileges will most explicitly warrant.

COGNIZANCE OF PRIVATE WRONGS BY THE COURTS. — *All private wrongs or civil injuries* are cognizable either in the courts ecclesiastical, military, maritime, or those of common law.

In the Ecclesiastical Courts the injuries cognizable are *pecuniary, matrimonial, and testamentary*.

The pecuniary injuries are: subtraction of tithes, non-payment of ecclesiastical dues, spoliation, dilapidations, non-repairs of the church, and the like.

The matrimonial injuries are: jactitation of marriage — i. e., where one boasts that he is married to another, whereby a common reputation of their marriage may ensue — subtraction of conjugal rights, inability for the marriage state, and refusal of decent maintenance to the wife.

The testamentary injuries are: disputing the validity of wills, obstructing of administration, and subtraction of legacies.

The Ecclesiastical Courts or Tribunals subsist and are admitted, in England, not by any right of their own, but upon bare sufferance and toleration from the municipal laws, and they are principally guided by the rules of the civil and canon laws. They must have recourse to the laws of England to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them, the only uniform rule to determine the jurisdiction of the courts in England being the common law.

The Ecclesiastical Courts have no other process than that of excommunication to enforce their sentences when pronounced, and the courts of common law will award a prohibition against the proceedings of the spiritual courts when they are manifestly repugnant to the fundamental maxims of the municipal law. Otherwise they lend a supporting hand to their authority.

In the Military Courts the injuries cognizable are injuries

in point of honor, encroachments in coat-armor, precedency, etc.

The proceedings are in a *summary* method, and its jurisdiction is declared by statute to be, "that it hath cognizance of contracts touching deeds of arms or of war out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the common law, together with other usages and customs to the same matters appertaining."

In the Maritime Courts the injuries cognizable are: injuries which, though in their nature of common law cognizance, yet being committed on the high seas, out of the reach of ordinary courts of justice, are, therefore, to be remedied in a peculiar court of their own.

The proceedings of a Court of Admiralty much resemble those of the civil law, but are not entirely founded thereon, as they likewise adopt and make use of other laws as occasion requires.

In the Common Law Courts the injuries cognizable are all the possible injuries whatsoever that do not fall within the exclusive cognizance of either the *ecclesiastical*, *military*, or *maritime* tribunals.

IN THE COURTS OF COMMON LAW, in treating of their *cognizance of private wrongs or injuries*, may be considere the wrongs or injuries *themselves*, and their *remedies*, and the pursuit of those remedies in the several courts.

The plain and natural remedy for every species of wrong or injury cognizable by the Courts of Common Law is, in general, by putting the party injured into possession of that right whereof he is unjustly deprived.

This is effected by delivery or restoration of the *thing* detained, or subject-matter in dispute, to the rightful owner; or, where that remedy is impossible or inadequate, by giving the party injured a satisfaction in *damages*.

The instruments by which these remedies may be obtained are by suits, or actions at law, which are distinguished into three kinds: *real*, *personal* and *mixed*.

Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof, or damages for some injury done to his person or property.

The former are said to be founded on *contracts*, and the latter on *torts*.

Real actions concern real property only, and are such whereby the plaintiff claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life.

Mixed actions are suits partaking of the nature of the other two, whereby some real property is demanded, and also personal damages for a wrong sustained.

All injuries are either with or without *force* or *violence*.

WRONG OR INJURIES, and their remedies. — They are either injuries to the *rights of persons*, or injuries to the *rights of property*.

Injuries to the rights of persons are either to their *absolute* or *relative* rights.

Injuries to the absolute rights of individuals are injuries to *personal security*, to *personal liberty*, and to *private property*.

Injuries to personal security are against one's life, limbs, body, health, or reputation.

Injuries to the limbs and body are threats, assaults, battery, wounding, and mayhem.

Threats and menaces, alone, only become an injury or wrong when attended with some consequent *inconvenience*.

Assault is an attempt or offer to beat another without touching him.

Battery is the unlawful beating of another.

Wounding consists in giving another some dangerous hurt.

Mayhem consists in violently depriving another of the use of a member proper for his defense in fight.

Injuries to health are by any unwholesome practices that effect, or tend to any apparent damage, to a man's vigor or constitution.

Injuries to reputation are: slander and malicious words, libels, and malicious prosecutions.

Slander is the malicious defaming of a person in his reputation, profession, or livelihood, by words tending to his damage or derogation.

Libels are injuries affecting a man's reputation by printing, writing, pictures, signs, or the like, which, by setting a man in an odious or ridiculous light, thereby tend to diminish his reputation.

The action of trespass on the case is a universal remedy given for all personal wrongs and injuries *without* force, or where the act is *not immediately* injurious, but only by consequence, and collaterally.

It is so called because the plaintiff's whole *case*, or cause of complaint, is set forth at length in the original writ.

The action of trespass *vi et armis* is the remedy for injuries accompanied *with* force or violence, or where the act done is in itself an *immediate* injury to another's person or property.

Injuries to personal liberty are by false imprisonment only, which consists in any kind of confinement, or detention of another, without sufficient authority.

Habeas corpus (have the body) is the great and efficacious writ in all cases of illegal confinement. It is a writ of *right*, which may not be denied, and is directed to the person detaining another, commanding him to produce the *body* of the prisoner, with the day and cause of his caption and detention, before the judge or court awarding the writ, that they may inquire into the cause of the commitment, and ascertain if it be just.

Injuries to the relative rights of persons, or to their rights in their relations to each other in society, are such injuries as affect the rights of husbands, parents, guardians, and masters.

Injuries to a husband are: abduction, or taking away his wife; adultery, or criminal conversation with her; and beating or otherwise abusing her.

Injuries to parents and guardians are: abduction of their children or wards.

Injuries to masters are: retaining his servants, or beating them.

INJURIES TO THE RIGHTS OF PRIVATE PROPERTY are either to those of *personal* or *real* property.

Injuries to personal property may be to property in *possession* or in *action*.

Injuries to personal property in possession are: by *dispossession*, or by *damage* while in the owner's possession.

Dispossession may be effected by unlawful *taking*, and by an unlawful *detaining*, though the original taking might be lawful.

The unlawful taking of goods and chattels is remedied by actual *restitution* — obtained by action of replevin or by satisfaction in *damages* — obtained by action on the case, trespass, or trover.

For the unlawful detaining of goods lawfully taken, the remedy is also by actual *restitution* — obtained by action of replevin or detinue, or by satisfaction in *damages* — by action on the case, or trover, and conversion.

For damage to personal property while in the owner's possession, the remedy is in *damages*; by action of trespass *vi et armis* if the act be *immediately* injurious; or by action on the case if the act occasions *consequential* damage.

For the action of replevin, being founded upon a distress wrongfully taken and without sufficient cause, is a redelivery of the pledge or thing taken in distress to the owner, upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him; after which the distrainer may keep it till tender made of sufficient amends, but must then redeliver it to the owner.

The action of detinue is for the recovery of the possession of goods in specie.

It is not much used, having given place to the action of trover.

The action of trover, in its origin, was an action of *tres-*

pass on the case for the recovery of damages against such a person as had found another's goods and refused to deliver them on demand, but converted them to his own use.

This action having certain advantages over that of *detinue*, such as requiring a less degree of certainty in describing the goods, by *fiction of law*, actions of *trover* were at length permitted to be brought, the injury being in the *conversion*.

Injuries to personal property in action arise by breach of contracts, express or *implied*.

Breaches of express contracts are: by non-payment of debts, by non-performance of covenants, and by non-performance of promises or *assumpsits*.

Breaches of implied contracts are such as arise from the nature and constitution of government, as the non-payment of money which the laws have directed to be paid; and such as arise from reason and construction of law, as the non-performance of legal presumptive or implied *assumpsits*, viz.: of a *quantum meruit*, of a *quantum valebat*, of expending money for another, of receiving money to another's use, of an *insimul computassent* on an account stated, of performing one's duty in any employment with integrity, diligence, and skill.

Debt is a sum of money due by certain and express agreement.

A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same.

Qui tam actions, or *popular actions*, are such where, usually, forfeitures created by statute are given at large to any common informer, or any person who will sue for the same. Sometimes part is given to the King, state, poor, or public use, and the other part to the informer or prosecutor.

Express warranty of chattels is that whereby the warrantor covenants or undertakes to insure that the thing which is the subject of the contract is as represented.

INJURIES TO REAL PROPERTY are: ouster, trespass, nuisance, waste, subtraction, and disturbance.

Ouster, or dispossession, is a wrong or injury that car-

ries with it the amotion or deprivation of possession, for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy in order to gain possession and damages for the injury sustained.

It is either from *freeholds* or from *chattels real*.

Ouster from freeholds is effected by abatement, intrusion, disseizin, discontinuance, and forfeiture.

Abatement is the entry of a stranger, after the death of the ancestor and before the *heir*.

Intrusion is the entry of a stranger, after a particular estate of freehold is determined, before him in *remainder* or *reversion*.

Disseizin is a wrongful putting out of him that is *seized* of the freehold.

Discontinuance is where a tenant in tail, or husband of a tenant in fee, makes a larger estate of the land than the law alloweth.

Forfeiture includes any other wrongful detainer of the freehold from him who hath the *property*, but who never had the possession.

Ouster from chattels real is from estates by statute-merchant, statute-staple, and *elegit*, or from an estate for years. It is effected by a kind of disseizin or ejectment.

A writ of *ejectione firmæ*, or *action of trespass in ejectment*, lies where lands, etc., are let for a term of years, and the lessee is ousted from his term, by which he recovers possession of his term and damages.

Ejectment is now the usual method adopted for trying titles to land instead of an action real.

Trespass is an entry on another man's ground without lawful authority or cause of justification, and doing some damage, however inconsiderable, to his property.

The *law* always couples the idea of *force* with that of trespass or intrusion upon the property of another.

Nuisance, or annoyance, signifies anything that worketh hurt, inconvenience, or damage.

It may be either a *public* and *common* nuisance, or a *private* nuisance, which latter is anything done to the hurt or annoyance of the corporeal or incorporeal hereditaments of another.

Waste is a spoil and destruction of an estate, either in houses, woods, or lands, by demolishing, not the temporary profits only, but the very substance of the thing, to the injury of him that hath the present interest, or him in remainder or reversion.

It is either *voluntary*, as by actual and designed demolition; or *permissive*, arising from mere negligence and want of care.

Subtraction is where a person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it, as rents and other services due by tenure, custom and the like.

It differs from disseizin in that the latter strikes at the very title of the party injured, and amounts to an ouster or actual dispossession, whereas subtraction is committed without any denial of the right, and consisting merely of non-performance.

Disturbance is usually a wrong done to some incorporeal hereditament by hindering or disquieting the owners in their regular and lawful enjoyment of it. It may be of franchises, of commons, of ways, of tenure, or of patronages.

The pursuit of remedies in the courts, furnished by the laws of England, is by *suit* or action in the *Courts of Common Law*, or by proceedings in the *Courts of Equity*.

OF ACTIONS IN THE COURTS OF COMMON LAW.—In an *action* in the Court of Common Pleas (which is the original and proper court for prosecuting *civil* suits), the general and orderly parts are: the original writ, the process, the pleading, the issue or demurrer, the trial, the judgment and its incidents, the proceedings in the nature of appeals, and the execution.

The original writ, or *præcipe*, is the beginning or foundation of a suit, and is directed to the defendant by the officer of the court, commanding him to do some certain thing, as to *appear* in court, or *show cause* to the contrary.

The process is (or includes) the means of *compelling* the

defendant to appear in court, viz. : either by summons, attachment, *distringas*, *capias ad respondendum*, and *testatum capias*, *alias*, and *pluries* writs, writ of *exigi facias*, proclamations and outlawry, appearance and common bail, arrest and special bail.

The summons is a written or verbal warning to appear in court at the return of the original writ.

The writ of attachment issues on the non-appearance of the defendant at the return of the original writ, whereby the sheriff is commanded to *attach* him by seizing some of his goods, which he shall forfeit if he do not appear, or by making him find safe pledges or securities, who shall be amerced in case of his non-appearance.

The writ of *distringas*, or distress *infante*, issues after attachment if the defendant forfeits his security and does not appear.

The writ of *capias ad respondendum* issues, commanding the sheriff to take the *body* of the defendant who neglects to appear after summons, attachment, and *distringas*.

The writ of *testatum capias* issues when the sheriff returns that the defendant is *non est inventus*, or not to be found in his bailiwick, and is directed to the sheriff of the county in which the defendant is supposed to be, reciting the former writ, and that it is *testified* that the defendant lurks or wanders in his bailiwick, wherefore he is commanded to take him.

The writ of *exigi facias*, or *exigent*, required the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and if he does, then to take him as in a *capias*; but if he does not appear, he shall then be outlawed.

Outlawry is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries, and is also attended with the forfeiture of all one's goods and chattels.

Appearance is when the defendant answers any of the different writs commanding him to appear in court by duly presenting himself in person or by attorney.

Bail is security given for one's appearance in court at a future day.

Bail is from the French word *bailler*, to deliver, because the defendant is bailed or delivered to his securities upon their giving security for his appearance, and is supposed to continue in their friendly custody instead of going to jail.

PLEADINGS are the mutual altercations between the plaintiff and defendant reduced to writing.

The general and orderly parts of pleading are: the declaration, the defense, the plea, the replication, the rejoinder, the sur-rejoinder, the rebutter, the sur-rebutter, etc.

The declaration, *narratio* or count, anciently called the *tale*, is the first pleading in which the plaintiff sets forth his cause of complaint at length.

Local actions are where possession of land is to be recovered, or damages for an actual trespass, or for waste, etc., affecting land.

Transitory actions are for injuries which might happen anywhere, as debt, detinue, slander, and the like.

Venue or *visne* is the *vicinia* or neighborhood in which the injury is declared to be done.

A **nonsuit** is when the plaintiff neglects to deliver or file a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law; or where, in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do; in which case a non-suit, or *non-prosequitur*, is entered, and he is said to be *non-pros'd*.

A **retraxit** is an open and voluntary renunciation by the plaintiff of his suit in court, whereby he forever loses his suit.

A **discontinuance** is when the plaintiff leaves a chasm in the proceeding of his cause, as by not continuing the process regularly from day to day, and from time to time, as he ought to do.

Defense, in its true legal sense, signifies, not a justification, protection, or guard, but merely an opposing or denial of the truth of the validity of the complaint.

Claim of cognizance or conuance is a claim to have the action tried in some special jurisdiction. It must be claimed before defense made, if at all.

Imparlance is a continuance of the cause, which the defendant is entitled to demand, and may, before he pleads, have granted by court, to see if he can end the matter amicably without further suit, by talking with the plaintiff.

Oyer. — The defendant may crave *oyer* of the writ, or of the bond or other specialty, upon which the action is brought — that is, to *hear* it read to him.

A plea is the defendant's answer of fact to the plaintiff's declaration.

Pleas are of two sorts: *dilatory pleas* and *pleas to the action*.

Dilatory pleas are such as tend merely to delay or put off the suit by questioning the *propriety of the remedy*, rather than by denying the injury.

They are to the jurisdiction of the court, to the disability of the plaintiff, or in abatement.

Pleas to the action are such as dispute the very *cause* of suit or answer to the merits of the complaint.

They are made by confessing or denying any *cause* of action, and are either *general* or *special* — pleas that totally deny the cause of complaint being the *general issue* or a *special plea in bar*.

The *general plea* or *general issue* is what traverses, thwarts, and denies at once the whole declaration without offering any special matter whereby to evade it.

An issue is a fact affirmed on one side and denied on the other.

Special pleas are usually in the affirmative, though sometimes in the negative, but they always advance some new fact not mentioned in the declaration, and then they must be averred to be true in the common form — “and this he is ready to verify.”

An estoppel is a *special plea in bar*, which happens where a man has done some act or executed some deed which *estops* or precludes him from averring anything to the contrary.

The conditions and qualities of a plea are: that it be single and contain only one matter; that it be direct and positive, and not argumentative; that it have convenient certainty of time, place and persons; that it answer the plaintiff's allegations in every material point, and that it be so pleaded as to be capable of trial.

A motion is an occasional application to court by the parties or their counsel, in order to obtain some rule or order of court necessary in the progress of a cause.

The replication is when the *plea* is in, if it does not amount to an issue, but only evades it, the plaintiff may plead again, and reply to the defendant's plea.

The subsequent pleadings are the rejoinder, the sur-rejoinder, the rebutter, the sur-rebutter, etc.

To give color is to suppose one to have an appearance or color of title — bad in deed in point of law.

Departure in pleading consists in varying from the title or defense which the party has once insisted on. This must be carefully avoided; the replication must support the declaration, and the rejoinder the plea.

New or novel assignment is when the plaintiff who has alleged in his declaration a *general* wrong, in his replication, after an *evasive* plea by the defendant, reduces that general wrong to more *particular certainty* by *assigning* the injury afresh in such manner as clearly to ascertain and identify it.

Duplicity in pleading must be avoided by every plea being simple, entire, connected, and confined to one single point.

Issue and demurrer — Issue is where the parties, in the course of pleading, come to a point affirmed on one side and denied on the other; which, if it be matter of *law*, is called a *demurrer*; but, if matter of fact, it still retains the name of an *issue of fact*.

A demurrer confesses the facts to be true, but denies the law arising upon those facts.

Continuance is the detaining of the parties in court from time to time.

Plea of puis darien continuance, or *since the last adjournment*, is where the defendant is permitted to plead some new matter that has arisen since he has pleaded, or even after issue or demurrer.

TRIAL is the examination of the matter of *fact* put in issue.

The several species of trial are: by record, by inspection or examination, by certificate, by witnesses, by wager of battel, by wager of law, and by *jury*.

Trial by the record is only had when the existence of such record is the point in issue, as where a matter of record is pleaded in any action, as a fine, judgment, etc., and the opposite party pleads "*nul tiel record*."

Trial by inspection, or *examination*, is had by the court, principally when the matter in issue is the evident object of the senses, and where, for the greater expedition of a cause, the judges, upon the testimony of their own senses, decided the point in dispute.

Trial by certificate is where such certificate must have been conclusive to a jury, as where the evidence of the person certifying is the only proper criterion of the point in dispute.

Trial by witnesses, or without the intervention of a jury (the method in the civil law), is where the judge is left to form his own sentence upon the credit of the witnesses examined.

Trial by wager of battel, or *judiciary duel*, is in the nature of an appeal to Providence, under an apprehension and hope that heaven would give the victory to him who had the right.

Trial by wager of law is only had where the matter in issue had been privately transacted between the parties themselves, without witnesses present, and consisted in the defendant's discharging himself from the claim on his own oath, bringing with him at the same time into court eleven of his neighbors to swear that they believed his statement to be true.

Trial by jury, or *per pais* (by the country), is of two kinds: *extraordinary*, or that of the grand assise or grand

jury, consisting of sixteen jurors, instituted by Henry II. to do away with the barbarous custom of dueling, etc.; and *ordinary*, by a jury of twelve free and lawful men of the body of the county.

Juries were either *special*, as where the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality; or *common*, as one returned by the sheriff according to the directions of statute.

Challenges are exceptions made to jurors, and are either to the *array* or to the *polls*.

Challenges to the array are at once an exception to the *whole* panel.

Challenges to the polls are exceptions to *particular* jurors, and are of four kinds, viz. : —

Propter honoris respectum, as if a lord of Parliament be empanelled on a jury, he may be challenged by either party or may challenge himself.

Propter defectum, as for defect in estate sufficient to qualify one to be a juror, etc.

Propter affectum, as for suspicion of bias or partiality.

Propter delictum, as for some crime that affects the credit of the juror.

A tales is a supply of such men as are summoned upon the first panel in order to make up a deficiency in the same.

Evidence signifies that which demonstrates, makes clear, or ascertains, the truth of the very fact or point in issue, either on the one side or the other. No evidence ought to be admitted on any other point.

A verdict is the finding of the jury.

A special verdict is where the jurors state the facts as they find them to be proved, and pray the advice of the court thereon.

JUDGMENT is the *sentence of the law* pronounced by the court upon the matter contained in the record.

A judgment is either upon demurrer, upon a verdict, by

confession or default, or by nonsuit or retraxit, and may be *interlocutory* or *final*.

Final judgment is such as at once puts an end to the action.

Interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit.

EXECUTION is putting the sentence of law in force.

The writ of *habere facias ad possessionem* is a writ of seizin of the freehold directed to the sheriff, commanding him to give actual possession to the plaintiff of lands recovered by him at law.

The writ of *capias ad satisfaciendum* is an execution of the highest nature, depriving a man of his liberty till he makes the satisfaction awarded.

The writ of *scire facias* is a judicial writ, founded upon some record, and requiring the person against whom it is brought to show cause why the party bringing it should not have the advantage of such record.

The writ of *fieri facias* commands the sheriff to seize and sell the defendant's goods and chattels, sufficient to satisfy the judgment and costs.

The writ of *levari facias* commands the sheriff to seize certain of the defendant's lands, to satisfy the plaintiff's demands.

PROCEEDINGS IN THE COURTS OF EQUITY differ from those in the courts of Common Law, principally in three points, viz. : —

In the mode of proof — by a discovery on the oath of the party, which gives a jurisdiction in matters of account and fraud.

In the mode of trial — by depositions taken in any part of the world.

In the mode of relief — by giving a more specific and extensive remedy than can be had in the Courts of Common Law, by executing agreements, staying waste or other injuries

by injunction, directing the sale of incumbered lands, by the true construction of the securities for money, by considering them merely as a pledge, and by the execution of trusts or uses in a manner analogous to the law of legal estates.

Equity, in its true and genuine meaning, is the soul and spirit of all law; *positive* law is construed, and *rational* law is made, by it.

BOOK IV.



PUBLIC WRONGS.

ANALYSIS OF BOOK IV.

Public wrongs ; in which are considered

- 1. The general nature of crimes and punishments,
- 2. The persons capable of committing crimes,
- 3. Their several degrees of guilt; as
 - 1. Principals,
 - 2. Accessories.
- 4. The various crimes; more peculiarly offending
 - 1. God and religion,
 - 2. The law of nations,
 - 3. The King and government; viz.:
 - 1. High treason,
 - 2. Felonies injurious to the prerogative,
 - 3. Præmunire,
 - 4. Misdemeanors and contempts.
 - 4. The commonwealth; viz.: offenses against
 - 1. Public justice,
 - 2. Public peace,
 - 3. Public trade,
 - 4. Public health,
 - 5. Public economy.
 - 5. Individuals; being crimes against
 - 1. Their persons; by
 - 1. Homicide,
 - 2. Other corporal injuries.
 - 2. Their habitations,
 - 3. Their property.
- 5. The means of prevention; by security for
 - 1. The peace, or
 - 2. The good behavior.
- 6. The method of punishment; wherein of
 - 1. The several courts of criminal jurisdiction,
 - 2. The proceedings therein.
 - 1. Summary, or
 - 2. Regular; by
 - 1. Arrest,
 - 2. Commitment and bail,
 - 3. Prosecution; by
 - 1. Presentment,
 - 2. Indictment,
 - 3. Information,
 - 4. Appeal.
 - 4. Process,
 - 5. Arraignment, and its incidents,
 - 6. Plea and issue,
 - 7. Trial and conviction,
 - 8. Clergy,
 - 9. Judgment,
 - 1. Forfeiture,
 - 2. Corruption of blood.
 - 10. Avoider of judgment; by
 - 1. Falsifying or reversing the attainder,
 - 2. Reprieve or pardon.
 - 11. Execution.

BOOK IV.

PUBLIC WRONGS, being breaches of general and public rights, affect the whole community, and are called crimes and misdemeanors, in treating of which may be considered the general *nature* of crimes and punishments, the *persons* capable of committing crimes, their several *degrees of guilt*, the several *species of crimes*, the *means of preventing crime*, and the *method of punishment*.

GENERAL NATURE OF CRIMES AND THEIR PUNISHMENT. — A crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding it.

A crime, in its *limited* sense, is confined to felony. They are indictable, and are defined and punishable by statute and common law.

A misdemeanor, in its *limited* sense, is a lesser degree of crime, and includes offenses inferior to felony, but still punishable by indictment and other prescribed proceedings.

Offenses are crimes not indictable, but punishable summarily, or by forfeiture of a penalty.

Misprisons and contempts are all such *high offenses* as are under the degree of capital.

Crimes are distinguished from *civil injuries* in that they are a breach and violation of the public rights due to the whole community.

In all cases the crime includes an injury.

Every public offense is also a *private* wrong, because it affects the individual as well as the community.

Punishments may be considered with regard to the *power*, the *end*, and the *measure* of their infliction.

The power or *right* of inflicting human punishments, for natural crimes, or such as are *mala in se*, was, by the law of

nature, vested in every individual; but, by the fundamental contract of society, is now transferred to the sovereign power, in which is also vested, by the same contract, the right of punishing positive offenses, or such as are *mala prohibita*.

The end of human punishment is to prevent future offenses — by amending the offender, by deterring others through his example, and by depriving him of the power to do future mischief.

The measure of human punishment must be determined by the wisdom of the sovereign power, and not by any uniform rule, though that wisdom may be regulated and assisted by certain general and equitable principles.

The persons capable of committing crimes are all persons, unless there be in them a *defect of will*; for, to constitute a legal crime, there must be both a vicious *will* and a vicious *act*.

As a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act, without a vicious will, is no crime at all.

The will is wanting, or does not concur with the act, in three cases, viz. :

First, where there is a defect of understanding, as infancy, idiocy, lunacy, and intoxication, which last, however, is no excuse.

Second, where no will is exerted, as misfortune or chance, and ignorance or mistake of fact.

Third, where the act is constrained by force and violence, as from compulsion or inevitable necessity, which is that of civil subjection; of *duress per minas*, choosing the least of two evils where one is unavoidable; and want or hunger, which is no legitimate excuse.

Infants under fourteen years of age are *prima facie* adjudged to be incapable of crime.

If a lunatic has lucid intervals of understanding, he must answer for what he does in those intervals — *ignorantia legis neminem excusat*.

PRINCIPALS AND ACCESSORIES are the different degrees of guilt in criminals.

Principals may be so in two degrees.

A principal in the first degree is he who is the actor or absolute perpetrator of the crime.

A principal in the second degree is he who is present, aiding and abetting the act to be done.

An accessory is he who is not the chief actor in the offense, nor present at its performance, but in some way concerned therein, either before or after the fact committed.

An accessory before the fact is one who, being *absent* at the time of the crime committed, doth yet procure, counsel, or command *another* to commit a crime.

An accessory after the fact is where a person, *knowing* a felony to have been committed, receives, relieves, comforts, or assists the felon.

In all degrees of crime under felony there are no accessories; all are principals.

The several species of crime are such as offend God and his holy religion, the law of nations, the King and government, the public or commonwealth, and individuals.

Offenses against God and religion are: apostasy, heresy, offenses against the established church, blasphemy, profane swearing and cursing, witchcraft, religious impostors, simony, sabbath-breaking, drunkenness, and lewdness.

Apostasy is a total renunciation of Christianity.

Heresy is an obstinate and public denial of some of the essential doctrines of Christianity.

Simony is the corrupt presentation of any one to an ecclesiastical benefice for gifts or reward.

Offenses against the law of nations are principally incident to states or nations, but, when committed by private subjects, are then the objects of the municipal law.

They are: violations of safe conducts, infringement of the rights of ambassadors, and piracy.

Piracy is committing those acts of robbery and depredation

on the high seas which, if committed on land, would have been felony.

Offenses against the King and government are: treason, felonies injurious to the prerogative, præmunire and other misprisons, and contempts.

Treason, treachery, or breach of faith, is an offense against the duty of allegiance, and is the highest known crime, for it aims at the very destruction of the commonwealth.

Præmunire is the offense of adhering to the temporal power of the Pope, in derogation of the regal authority, by introducing a foreign power into the land; in paying that obedience to papal process and authority that constitutionally belongs to the King.

Misprisons and contempts are all such high offenses as are under the degree of capital.

Misprison of treason consists in the bare knowledge and concealment of treason, without any degree of assent thereto.

Offenses against the public or commonwealth are: against public *justice*, public *peace*, public *trade*, public *health*, and public police or *economy*.

Offenses against public justice are: embezzling or vacating records, or falsifying proceedings in court by personating others, etc., compelling prisoners to become approvers, obstructing execution of legal process, escapes from arrest, breach of prison, rescue, returning from transportation, taking rewards to help one to his stolen goods, receiving stolen goods, theft-bote, or compounding a felony, barrettry, maintenance, champerty, compounding prosecutions on penal statutes, conspiracy and threats of accusation to extort money, perjury and subornation thereof, bribery, embracery, false verdict of jurors, negligence of public officers, etc., oppression by magistrates, and extortion of officers.

Embezzlement is the act of appropriating to one's self that which is received in trust for another.

Rescue is the forcibly and knowingly freeing another from an arrest and imprisonment.

Theft-bote, or *compounding of felony*, is the crime of receiving back from a felon one's goods, or other amends, upon agreement not to prosecute.

Barretry is the habitual moving, exciting, stirring up, and maintaining suits and quarrels at law, or otherwise.

Maintenance bears a near relation to barretry, being an officious intermeddling in a suit that in no way belongs to one by *maintaining* or assisting either party with money or otherwise.

Champerty is a species of maintenance, being a bargain between two that they share the lands sued for between them if they prevail, the champertor bearing the expenses of the suit.

A Conspiracy is an agreement between two or more persons to do an unlawful act, or any of those acts which, by the *combination*, become injurious to others.

Perjury is where a person to whom a lawful oath has been administered, in some judicial proceeding, swears willfully, absolutely, and falsely in a matter material to the issue.

Subornation of Perjury is the offense of procuring another to take such false oath as constitutes perjury in the principal.

Bribery is when a judge, or other person, takes any undue reward to influence his behavior in office.

Embracery is an attempt to corrupt or influence a jury by any means whatever, whether the jury gives a verdict or not, and whether the verdict be true or false.

Offenses against the public peace are: riotous assemblies, armed or hunting in disguise, threatening or extorting by letters, destroying turnpikes, flood-gates, etc., affrays and breaches of the peace, riots, routs and unlawful assemblies, tumultuous petitioning, forcible entry and detainer, going unusually armed, spreading false news, pretended prophesying, challenges to fight, and libels.

Disturbance is the hindering or disquieting people in their lawful enjoyment and privileges.

An affray is the fighting of two or more persons in some public place, to the terror of the people.

If it be in private, it is an *assault*.

A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel.

A rout is where three or more meet to do an unlawful act upon a common quarrel, and only make some *advances* toward it.

Unlawful assemblies are where three or more *assemble* together to do an unlawful act, and part without doing it, or making any motion towards it.

Riots, routs, and unlawful assemblies, to constitute them, *must* have at least *three* persons.

Forcible entry and detainer is violently taking, or keeping possession of, lands and tenements with menaces, force, and arms, and without the authority of law.

Offenses against public trade are: owling, smuggling, fraudulent bankruptcy, usury, cheating, forestalling, regrating, engrossing, monopolies, exercising a trade not having served an apprenticeship, transporting, and enticing our artists to settle abroad.

Owling—so called from being carried on at night—is transporting wool or sheep out of the kingdom, to the detriment of its staple manufacture.

Smuggling is importing goods without paying the duties thereon.

Forestalling is buying or contracting for any merchandise or victual while on its way to market.

Regrating is buying corn, or other dead victual, and selling it again in the same market, which enhances prices.

Engrossing is buying up corn, or other dead victual, in *large* quantities, to sell again.

Monopolies are much the same offense in other branches of trade that *engrossing* is in provisions.

In another sense, a monopoly is where a right, before common to all, is withdrawn from the mass of the community and vested in one or more individuals, to the exclusion of all others.

Offenses against the public health are: irregularities in time of plague, or of quarantine, and selling unwholesome provisions.

Offenses against the public police, economy, or domestic order are: clandestine and irregular marriages, bigamy, idling and wandering of soldiers and mariners, remaining in England of outlandish persons called Egyptians or Gypsies, common nuisances, idleness, vagrancy, etc., luxury and extravagance, gaming, destroying game, etc.

Common nuisances are: annoyances in highways, bridges and rivers, offensive trades, *disorderly houses*, lotteries, fireworks, eaves-dropping, common scolds, etc.

Offenses or crimes against individuals are either against their *persons*, their *habitations*, or their *property*.

Offenses against the persons of individuals are: homicide or other corporal injuries.

Homicide is the taking of life, or the killing of any human creature, and it is either *justifiable*, *excusable*, or *felonious*.

The first has no share of guilt at all, the second very little, but the third is the highest crime against the law of nature that man is capable of committing.

Justifiable homicide is either by *command* or *permission* of law.

By *command of law*, as the execution of criminals.

By *permission of law*, viz.: first, for the advancement of public *justice*, as by an officer in discharge of his duty.

Second, to prevent some felony or atrocious crime, as if any person attempts to break open or burn a house in the night-time, or to rob or murder another.

Excusable homicide is by *misadventure* or in *self-defense*.

Homicide by misadventure is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another.

Homicide in self-defense is upon that principle of self-preservation whereby a man may protect himself when attacked by another, as if violently, or where there is no other means of escape except by slaying his assailant.

Chance-medley is such killing as happens in self-defense upon a sudden rencounter or affray; it is excusable rather than justifiable.

There is one species of homicide in self-defense where the party *slain* is equally innocent as he who occasioned his death, namely: in the case of two persons shipwrecked, struggling for the same plank, and one is pushed off.

Felonious homicide is the killing of a human creature without justification or excuse, which is by *killing one's self* or by *killing another*.

Killing one's self, or suicide, is where one deliberately, or by any unlawful malicious act, puts an end to his own life.

Killing another is either *murder*, where it arises from wickedness of the heart; or *manslaughter*, where it does not.

Manslaughter is the unlawful killing of another without malice, either expressed or implied.

It is either *voluntary* or *involuntary*.

Voluntary manslaughter is upon a sudden heat or quarrel.

Involuntary manslaughter is perpetrated in the commission of some unlawful act.

In every case of homicide upon provocation, if there be sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, *this* is deliberate revenge, and not heat of blood, and is murder.

Excusable homicide in self-defense differs from voluntary manslaughter on a sudden provocation in that, in the one case, there is an *apparent necessity*, for self-preservation, to kill the aggressor; and in the other, no necessity at all, it being only a *sudden act of passion*.

When an involuntary killing happens while in the commission of an unlawful act, in general it will be either *murder* or *manslaughter*, according to the nature of the act which occasioned it. If in the prosecution of a *felonious* intent, or if in its *consequences* naturally tending to bloodshed, it will be

murder; but if no more than a mere civil *trespass* was intended, it will only amount to manslaughter.

Murder is when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the King's peace, with malice aforethought, either express or implied.

By *statute* in Pennsylvania, all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the *first degree*; and all other kinds of murder shall be deemed murder of the *second degree*.

Express malice is when one, with a sedate, deliberate mind, and formed design, doth kill another.

Implied malice is where, for instance, a man willfully poisons another, or kills another, without any, or but little, provocation.

Parricide is the murder of one's parents.

Fratricide, the murder of one's brother.

OTHER CORPORAL INJURIES to the persons of individuals, not amounting to homicide, are: mayhem, abduction and marriage or defilement, seduction, fornication, adultery, rape, buggery, assault, battery, wounding, false imprisonment, and kidnapping.

Fornication is the unlawful carnal knowledge of an unmarried person with another.

When either party is married the offense, as to him or to her, is *adultery*.

Adultery, or *criminal conversation*, is the violation of conjugal fidelity.

Seduction is the corruption of women, as by illicit connection with any female of good repute, under twenty-one years of age, and under promise of marriage.

Rape is the carnal knowledge of a woman forcibly, and against her will.

Buggery is the crime against nature, committed with man or beast.

Kidnapping is the forcible stealing away of a person from his own country, and sending him into another.

Offenses against the habitations of individuals are: arson and burglary.

Arson is the malicious and willful burning of the house or out-house of another.

Burglary is the breaking and entering in the night-time the mansion house of another, with intent to commit a felony.

Offenses against private property of individuals are: larceny, malicious mischief, and forgery.

Larceny is the felonious taking and carrying away of the personal goods of another.

Simple larceny, or plain theft, is unaccompanied with any other atrocious circumstances.

Compound larceny includes the aggravation of a taking from one's house or person.

Robbery, or open larceny from the person, is the felonious and forcible taking from the person of another goods or money of any value, by violence or putting him in fear.

Malicious mischief is the doing of mischievous damage to private property, without any intent to gain by another's loss, but out of a spirit of wanton cruelty or revenge.

Forgery is the fraudulent making or alteration of a writing, to the prejudice of another man's right.

The means of preventing offenses or crimes (since *preventive* justice is, upon every principle of reason, humanity, and sound policy) is by compelling suspected persons to give *security to keep the peace*, or for *good behavior*, and is effected by binding them in *recognizance*, which is an obligation with one or more securities, entered on record, and taken in some court, or by some judicial officer.

The methods of punishment include the *proceedings* in courts, which in criminal courts are *summary* or *regular*.

Summary proceedings are such whereby a man may be

convicted of divers offenses, without any formal process or jury, at the discretion of the judge.

The regular proceedings in the Courts of Common Law are: arrest, commitment and bail, prosecution, process, arraignment, plea and issue, trial and conviction, clergy, judgment, reversal of judgment, reprieve or pardon, and execution.

Arrest is the apprehending or restraining of one's person in order to be forthcoming to answer an alleged or suspected crime.

Commitment is the confinement of one's person in prison, for safe custody, by warrant from proper authority.

Bail is a security given, according to law, to insure the attendance at a future time of a party in court, and taken before a proper tribunal.

Commitment being only for safe custody, whenever *bail* will answer the same intention, it ought to be taken. But in offenses of a capital nature, no bail can be a security equal to the actual custody of the person. Such persons have no other sureties but the four walls of the prison. In bailable cases bail must not be refused, insufficient bail must not be taken, nor excessive bail required.

Prosecution, or the manner of accusing and prosecuting offenders, is by *presentment*, *indictment*, *information*, and *appeal*.

Presentment is the notice taken by a grand jury of any offense, from their *own* knowledge or observation, and upon which an indictment may be framed.

Indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury, expressing with sufficient certainty the person, time, place, and offense.

Informations are of two kinds: those at the suit of the King and a subject, upon penal statutes — a sort of *qui tam* action, where part of the penalty goes to the informer — and those at the suit of the King or state only.

Appeal is an accusation or suit brought by one private sub-

ject against another, as for larceny, rape, mayhem, arson, homicide, etc., which the King cannot pardon, but the party injured alone can release.

An **inquisition** is the act of a jury, summoned by the proper officer, to inquire into a matter upon the evidence laid before them.

Process, or the means of compelling the appearance of the defendant to answer when indicted, in his absence, is, in misdemeanors, by *venire facias*, distress infinite, and *capias*; in capital crimes, by *capias* only; and in both, by outlawry.

Arraignment is the calling of the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.

The plea of the prisoner, or defensive matter alleged by him in his arraignment, is either a plea to the jurisdiction, a demurrer in point of law, a plea in abatement, a special plea in bar, as a former acquittal, conviction, attainr, or a pardon, or the general issue — *not guilty*.

A plea to the jurisdiction is, when an indictment is before a court that hath no cognizance of the offense, the prisoner may except to the jurisdiction of the court by a plea to the jurisdiction without answering to the crime alleged.

A demurrer in point of law to the indictment is when the fact alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact as stated is no felony, etc., as alleged.

A plea in abatement is principally for a *misnomer*; or wrong name, etc.

A special plea in bar goes to the merits of the indictment, and gives a reason why the prisoner ought not to answer it at all, nor put himself upon trial for the crime alleged.

The plea of a *former acquittal* is founded on the common law maxim that no man is to be brought into jeopardy of his life or tried more than once for the same offense.

Trials for offenses or crimes were formerly more numerous than at present. The different kinds were: by ordeal,

either fire or water; by the *corsned*, or morsel of execration; by battle or duel, in appeals, etc.; and by *jury*.

Trial by ordeal was principally in use among our Saxon ancestors, as also that of the *corsned*; the former being the most ancient, and was of two kinds — by *fire* and *water*; that by fire being confined to persons of a higher rank.

Trial by fire ordeal was performed by taking up in the hand, unhurt, a piece of red-hot iron of two or three pounds weight, or walking, unhurt, barefoot and blindfolded, over nine red-hot plough-shares, laid at unequal distances.

By this method Queen Emma, the mother of Edward the Confessor, is said to have cleared her character, when suspected of familiarity with Alwyn, Bishop of Winchester.

Trial by water ordeal was performed either by plunging the bare arm up to the elbow in boiling water, unhurt, or casting the suspected person into a river or pond; if he floated without any action of swimming, it was deemed evidence of his guilt, but if he sunk he was acquitted.

Trial by ordeal was abolished in the reign of Henry III (about 1250).

Trial by the *corsned*, or morsel of execration, was by swallowing a piece of cheese or bread, about an ounce in weight, consecrated with abjuration, "I will take the sacrament upon it; may this morsel be my last," etc., desiring of the Almighty that it might cause convulsions and paleness, etc., if guilty.

Historians assure us that Goodwin, Earl of Kent, in the reign of Edward the Confessor, abjuring the death of the King's brother, at last appealed to his *corsned*, which stuck in his throat and killed him.

In trials by jury challenges may be made on the part of the King or that of the prisoner, and either to the whole array or the separate polls, and for the same reasons made in *civil* cases; but in *criminal* cases the prisoner is allowed to make *peremptory* challenges — that is, without showing any cause or reason.

Benefit of clergy was an arrest of judgment in criminal

cases, and had its origin in the usurped jurisdiction of the popish ecclesiastics, in exempting clergymen or their clerks, which included every one that could read, etc., from criminal process before the secular judges in certain capital cases only. The defendant was burned with a hot iron in the brawn of his left thumb, to show that he had been admitted to this privilege, which was not allowed twice to the same person.

Judgment follows upon conviction, being the pronouncement of that punishment which is expressly ordained by law.

Judgment is reversed by *falsifying* or *reversing* the attainder or judgment, or by *reprieve* or *pardon*.

Attainder is the stain or corruption of the blood of a criminal capitally condemned; it is the immediate inseparable consequence, by the common law, on sentence of death being pronounced, or of outlawry, for a capital offense. Its consequences are forfeiture of property and corruption of blood, and the criminal becomes dead in law.

It differs from conviction in that it is *after* judgment, whereas conviction is *before* judgment pronounced, and may be quashed on some point of law reserved.

Attainder is *falsified* or reversed for matter *dehors*, or not apparent on the face of the record, by writ of error for mistakes apparent on the face of the record, and by act of Parliament.

Outlawry when reversed, restores the party to the same plight as if he had appeared upon the *capias*.

Reprieve — *from reprendre*, to take back — is a temporary withdrawing or suspension of a sentence or judgment, whereby the execution is delayed.

It is granted by the judges where they are not satisfied with the verdict, the evidence suspicious, the indictment insufficient, where there is doubt, for time to apply for pardon, because of pregnancy, insanity, non-identity, etc.

Pardon is a permanent avoider of the judgment, by the King's mercy, drawn in due form of law, and allowed in open court, thereby making the offender a new man.

The King cannot pardon offenses prosecuted by appeal,

common nuisances, or offenses against penal statutes, nor is his pardon pleadable to impeachment by the commons in Parliament.

Penal laws or *statutes* are those which prohibit an act, and impose a penalty for the commission of it.

Execution is, in criminal cases, the completion of human punishment.

The warrant of execution is sometimes under the hand and seal of the judge, by writ from the King, or by rule of court, but commonly by the judge's signing the calendar of prisoners, with their separate judgments in the margin.

“The student will observe that the knowledge of the law is like a deep well, out of which each man draweth according to the strength of his understanding.” — *Coke*.

PLEADINGS:
INCLUDING
PARTIES TO ACTIONS
AND
FORMS OF ACTIONS.

ABRIDGED.

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 - Plaintiffs.
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PLEADINGS.

PLEADING is the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense. — *Chitty*.

Pleadings are the mutual altercations between the plaintiff and defendant reduced to writing. — *Blackstone*.

Pleadings are the proceedings, from the declaration to the issue, joined. — *Wharton*.

PARTIES TO ACTIONS.

The general rule is that the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative.

In general, courts of law do not directly recognize *mere equitable* rights, but leave them to the protection of courts of equity. That rule, however, prevails more strictly as regards *real property* than with respect to injuries to the *person* or *personal property*.

ACTIONS IN FORM EX CONTRACTU. — **Plaintiffs.** — In general, the action on a *contract*, whether express or implied, or whether by parol, or under seal, or of record, must be brought in the *name* of the party in whom the *legal interest* in such contract was vested, and, in general, with his *knowledge and concurrence*, or at least a sufficient indemnity must be tendered before his name can properly be used by the party beneficially interested.

The right of action at law has been vested solely in the

party having the strict *legal* title and interest, in exclusion of the mere equitable claim.

In simple contracts, or instruments *not under seal*, it seems to be a general principle that the party for whose sole benefit it is evidently made may sue thereon in his own name, although the engagement be not directly to or with him.

In the case of bills of exchange or promissory notes there is an *option* of plaintiff that might be considered an *exception* to the general peremptory rule that the right of suing can only be in *one* person or set of persons, viz.: that a party to a bill may, by arrangement between the parties, be the plaintiff, although the bill at the time be in the rightful possession of another party to the bill.

The action against a carrier for loss of goods sent by a vendor to a vendee must, in general, be brought in the name of the *latter*, and not of the consignor, because the law implies that, by the delivery to the carrier, the goods became the property of the consignee, and at his risk, subject of course to the unpaid vendor's right of stoppage *in transitu*.

A mere servant or agent with whom a contract is expressly made on behalf of another, and who has no direct beneficial interest in the transaction, cannot, in general, support an action thereon.

But when an *agent* has any *beneficial interest* in the performance of the contract, as for commissions, etc., or a special property or interest in the subject-matter of the agreement, he may support an action in his own name upon the contract, as in the case of a factor, broker, warehouseman, carrier, auctioneer, etc.

When the contract was made with several persons, whether it were under seal, or in writing but not under seal, or by parol, *if their legal interest were joint*, they must all, if living, join in an action, in form *ex contractu* for the breach of it, though the covenant or contract with them was in terms joint and several.

The reason assigned why all should join is that when the interest is joint, if several were permitted to bring several

actions for one and the same cause, the court would be in doubt for which of them to give judgment.

But when the legal interest and cause of action of the covenantees are several, each *may*, and *should*, sue *separately* for the particular damages resulting to him individually, although the covenant be in its terms joint.

It is improper, as well in *equity* as at *law*, for a party to be joined in a suit who has neither legal nor beneficial interest in its subject-matter.

Where a covenant is made with two or more parties to pay them money for themselves, or for the use of another, it is not correct to use the name of one only of the covenantees, although the others have omitted to execute the deed. Where joint covenantees *may* join, they must do so.

In the case of partners it is a general rule that all the members of the firm should be the plaintiffs in an action upon a contract made with the firm, nor can any private arrangement by the firm, that one only of the partners shall bring the action, give him a right to sue alone.

In the case of dormant partners, not privy to the contract, it seems that the other members of the firm *may omit* their names in an action.

If tenants in common (who hold by distinct titles) *jointly* demise premises, reserving an entire rent, they may, and perhaps should, join in an *action* to recover it; but if the rent be reserved to them separately in distinct parts, they must sue *separately*.

Joint tenants, unlike tenants in common, have a unity of title and interest, in respect of which they *must jointly* sue upon a contract relating to the estate, which is made by, or inures to, the benefit of all.

Parceners, for the same reason, must join in an action *ex contractu* which relates to their tenants.

The consequences of a mistake in *omitting* to join a party who ought to have been made plaintiff in an action *ex contractu*, or in *adding* a party improperly in such an action, are extremely serious.

The general rule is that the omission of proper parties as plaintiffs in cases of contract may be taken advantage of at the trial under the general issue; and if it appear on the face of the pleadings, it is fatal on demurrer, or on motion in arrest of judgment, or on error, and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it, either by a *plea in abatement* or as a ground of nonsuit.

If there be a legal ground for omitting to use the name of one of several covenantees as a plaintiff, as his death, etc., it is necessary to show such excuse for the non-joinder in the declaration.

Where a party with whom a bond, simple contract, or other mere *personal* contract, was made, has assigned his interest therein to a third person, the latter cannot, in general, sue in his own name, the interest in, and remedy upon, *personal* contracts being *choses in action*, which are not in general assignable at law, so as to give the assignee a right of action in his own name, but he must proceed in that of the assignor, or, if he be dead, in the name of his personal representative.

There are instances in which, by express legislative provision, the assignee of a chose in action may sue in his own name to enforce the recovery of the demand. The operation of the bankrupt and insolvent act is to this effect.

By the custom of merchants the assignee or transferee of a bill of exchange, or check on a banker, may sue thereon in his own name.

When one or more of several obligees, covenantees, partners, or others having a *joint legal* interest in the contract, dies, the action must be brought in the name of the survivor, and the executor or administrator of the deceased must not be joined, nor can he sue separately, though the deceased alone might be entitled to the *beneficial* interest in the contract, and the executor must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered; but if

the interest of the covenantees were *several*, the executor of one of them may sue, though the other be living.

In the case of a mere *personal* contract, or of a *covenant not running with the land*, if it were made only with *one* person, and he be dead, the action for the breach of it must be brought in the name of his executor or administrator, in whom the legal interest in such contract is vested.

But on a covenant relating to *realty*, as for good title on a deed of conveyance, an *executor* cannot sue, even for a breach in the lifetime of his testator, without showing some special damage to the *personal estate of the latter*, but the action must be brought in the name of the *heir* or *devisee*.

If an executrix or administratrix marry, she and her husband should join for the breach of any *personal* contract made with the deceased; but if she sue alone, the defendant cannot avail himself of the non-joinder except by a plea in abatement; and when a bond or other contract is made to husband and wife as executrix, he may sue alone.

When an executor dies after he has proved the will, his executor, or the executor of such executor, is the party to sue on the contract made with the original testator, provided the money to be recovered would be the assets of the representative of the original testator himself; and the same rule applies in the case of the death of an administrator of the intestate. If the money to be recovered would be assets of the original testator, then, in case of the death of his first representative, administration *de bonis non* must be obtained, and the defendant sued accordingly.

In the case of bankruptcy the *legal* rights of the bankrupt, arising from contracts made with him, and in the performance whereof the bankrupt is beneficially interested, are, by the express provisions of the bankrupt act, transferred to, and vested in, his assignees, who may recover the same *in their own names*. There are cases, however, in which the bankrupt may sue as trustee for his creditors.

In the case of insolvency the insolvent debtor's act directs that the prisoner shall, at the time of petitioning for

relief, assign all the estate and effects he is then possessed of and all future effects which may come to him before he shall become entitled to his discharge, to the provisional assignee of the court; and that it shall be lawful for the provisional assignee to sue in his own name, *if the court shall so order*, for the recovering, obtaining, and enforcing of any estate, debts, effects, or rights, of any such prisoner.

The effect of marriage, at least in courts of law, is to deprive the wife of all separate legal existence, her husband and herself being, in law, but one person.

It is, therefore, a general rule that she cannot, during the marriage, maintain an action without her husband; either upon contracts made by her before or after marriage, although they may be living apart under the provisions of a formal deed of separation, or by virtue of a divorce *a mensa et thoro* for adultery.

The exceptions are in the instance of a divorce *a vinculo matrimonii*, or where the husband is dead in law.

All chattels personal of the wife in possession are by marriage absolutely given to the husband, and for the recovery of them he may sue alone; and it is a general principle "that that which the husband may discharge alone, and of which he may make disposition to his own use, for the recovery of this he may sue without his wife."

As mere *choses in action* of the wife do not by the marriage vest absolutely in the husband until he reduce them in possession, and, if not reduced into possession, she would take them by survivorship. In general he cannot sue alone, but must join his wife in all actions upon bonds and other personal contracts made with the wife *before* the marriage, whether the breach were before or during coverture; and also for rent, or any other cause of action accruing before the marriage, in respect of the real estate of the wife.

When the wife is executrix or administratrix, as her interest is in *autre droit*, the husband must, in general, join in an action.

In general, the wife cannot join in an action upon a

contract made during the marriage, as for her work and labor, goods sold, or money lent by her during that time, for the husband is entitled to her earnings, and they shall not survive to her, but go to the personal representatives of the husband, and she could have no property in the money lent or the goods sold.

But when the wife can be considered as the *meritorious* cause of action, as of a bond or other contract under seal, or a promissory note, be made to her separately or with her husband, or if she bestow her personal labor and skill in curing a wound, etc., she may join with the husband, or he may sue alone.

Where the wife is joined in the action, in these cases, the declaration must distinctly disclose her interest, and show in what respect she is the meritorious cause of action, and there is no intendment to this effect.

For rent, or other cause of action accruing during the marriage, or a lease or demise, or other contract relating to the land or other real property of the wife, whether such contract were made before or during the coverture, the husband and wife may *join* or *he may sue alone*.

If the husband survive, there is a material distinction between chattels real and *choses in action*. The husband is entitled to the chattel real by survivorship, and to all rent, etc., accruing during the coverture, and also to all chattels given to the wife during the coverture in her *own* right.

But mere *choses in action*, or contracts made with the wife before coverture, do not survive to the husband, and he must, to recover the same, sue as administrator of his wife.

If the wife survive, she is entitled to all chattels real which her husband had in her right, and which he did not dispose of in his lifetime, and to arrears of *rent*, etc., which became due during the coverture, upon her antecedent demise, or upon their joint demise, during the coverture to which she assents after his death, and to all arrears of rent and other *choses in action* to which she was entitled before the

covertures, and which the husband did not reduce into actual possession.

The consequences of a mistake in the proper parties, in the case of *baron* and *feme*, are, that when a married woman might be joined in the action with her husband, but sues alone, the objection can only be pleaded in abatement, and not in bar, though the husband might sustain a writ of error, and if she marry after writ, and before plea, her coverture must be pleaded in abatement, and cannot be given in evidence under the general issue.

But when a *feme* improperly sues alone, having no legal right of action, she will be nonsuited; and if she improperly join in an action with her husband, who ought to sue alone, the defendant may demur, or the judgment will be arrested or reversed on a writ of error.

And if the husband sue alone when the wife ought to be joined, either in her own right or in *autre droit*, he will be nonsuited; or if the objection appear on the record, it will be fatal in arrest of judgment or on error.

DEFENDANTS. — In general, the action upon an *express* contract, whether it be by deed or merely in writing, or by parol, must be brought against *the party who made it*, either in person or by agent.

A party who expressly contracts, and permits credit to be given to him, is liable, although he were not the strict *legal owner* of the property in respect of which the contract is made, nor *beneficially* interested.

Difficulties frequently occur in deciding who should be made the defendant in an action upon a promise created or *implied by law* from a particular state of facts. In this case it must be ascertained who is the party subject to the legal liability, for he is the person who should be sued.

A mere equitable or moral obligation to pay a demand is, in the absence of an express promise, insufficient to support an action.

A contract made by an agent, as such, is, in law, the contract of the principal; the general rule, therefore, is that

when a person has contracted in the capacity of an *agent*, and that circumstance is known at the time to the person with whom he contracts, such agent is not liable to an action for non-performance of the contract, even for a deceitful warranty, if he had authority from his principal to make the contract.

If an agent covenant under seal for the act of another, though he describe himself in the deed as contracting for, and on the part and behalf of, such another person, or if he accept or draw a bill of exchange generally and not as agent, he is personally liable, unless in the case of an agent on behalf of government.

In general, where an agent enters into a written agreement, as if he were the principal, and the credit is given to him, he is personally liable; but this liability must be collected from the instrument upon a reasonable exposition of the whole of its terms.

Where the agent does not, at the time the contract is made, disclose that he is acting merely as an agent, and the principal is unknown, the latter may, when discovered, be sued upon the agreement.

But the principal is not liable upon the contract of his agent if the other party to the agreement, with full knowledge of the facts, and the power and means of deciding to whom he will give credit, elect to give credit to the agent only in his individual character.

At law, one partner or tenant in common cannot in general use his copartner or cotenant in any action in form *ex contractu*, but must proceed by action of account or by bill in equity.

It is an answer to an action that a party is *legally interested in each side of the question*. A party cannot be both plaintiff and defendant in an action. If, therefore, one of the plaintiffs be also a member of the firm against which the action is brought upon a contract entered into by the firm, the action shall fail, although the other partners only be sued.

A lunatic is liable for goods suitable to his rank,

supplied to him upon a contract which a person, not aware of his infirmity, *bona fide* enters into with him.

The rule is that several persons contracting together with the same party, for one and the same act, shall be regarded as jointly, and not individually or separately, liable, in the absence of any express words to show that a distinct as well as entire liability was intended to fasten upon the promisers. This rule is more particularly obvious in the case of promises *implied* by law.

Where there are several parties, if their contract be joint, they must all be made defendants, although they subsequently arrange amongst themselves that one only of them shall perform the contract.

Where the covenant or promise is so framed that it does not confer upon the plaintiff a remedy against the contractors jointly, but each is only *separately* responsible for his own act, it is essential to sue them distinctly; but where it appears upon an instrument that a promise between two contractors was *intended* to be *joint*, it may be treated as such, although the promise be *in terms* several only.

When the contract is several as well as joint, the plaintiff is at liberty to proceed against the parties jointly, or each separately, though their interest be joint. But if there be more than two parties to a joint and several contract — as where three obligors are jointly and severally bound — the plaintiff must either sue them all jointly or each of them separately.

In general, when a contract is joint and several, if the debt be considerable, it is most advisable to proceed separately, so that the creditor may thereby retain his legal remedies against each in case of death of one or more of the parties.

Courts of law, as well as equity, will not take cognizance of distinct and separate claims, or liabilities of different persons in suit, though standing in the same relative situations; therefore, in an action *ex contractu* against several, it must

appear on the face of the pleadings that their contract was joint, and that fact must also be proved on the trial.

Mis-joinder is an action founded on a contract. If too many persons be made defendants, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error; and even if the objection do not appear upon the pleadings, the plaintiff may be nonsuited upon the trial if he fail in proving a joint contract.

The consequence of the joinder of too many defendants in an action founded on a *contract* are in general so important, it is advisable, in cases where it is doubtful how many parties are liable, to proceed only against those defendants who are certainly liable, in which case *non-joinder* can only be taken advantage of by a plea in abatement.

In general, in the case of a mere personal contract, the action for the breach of it cannot be brought against a person to whom the contracting party has assigned his interest, and the original party alone can be sued.

There may, however, in some cases be a *change of credit* by agreement between the parties, so as to transfer the liability from the original contracting party to another, or to one only of the original parties.

In the case of a *joint contractor*, if one of the parties die, his executor or administrator is, *at law*, discharged from liability, and the survivor alone can be sued, and if the executor be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue, but in equity the executor of the deceased party is liable, unless in some instances of a surety.

If the contract were several, or joint and several, the executor of the deceased may be sued at law in a separate action, but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis*.

When the contracting party is dead, his executor or administrator, or, in case of a joint contract, the executor or

administrator of the survivor, is the party to be made defendant, and is liable, though not expressly named in the covenant or contract.

If the contract is under seal (or of record), the *heir* of the party contracting is liable to an action for the breach of an *express* covenant therein, provided the ancestor expressly bound himself "and his heir" by the deed or obligation, and provided the heir have *legal* assets by descent from the obligor.

When the contracting party has become bankrupt, and has obtained his certificate, he is, in general, no longer liable to be sued in respect of any debt due from him when he became bankrupt, or of any claim or demand which the creditor might have proved under the commission.

By the insolvent act an insolvent complying with the requisitions of the act is to be discharged by the court from his liabilities.

In general, a *feme covert* cannot be sued alone at law; and when a *feme sole*, who has entered into a contract, marries, the husband and wife must be jointly sued.

When the husband survives he is not liable to be sued in that character for any contract of the *feme*, made before coverture, unless judgment had been obtained against him and his wife before her death; if she die before judgment, the suit will abate.

But if the husband neglects, during her life, to reduce her *choses in action* into possession, the creditor may sue the person who administers thereto for debts due before her marriage, and for rent accruing during the coverture; or, for money due upon a judgment obtained against husband and wife, he may be sued alone as the survivor.

In case the wife survive she may be sued upon all her unsatisfied contracts made before coverture.

If the husband be sued alone upon the contract of his wife before coverture, and the objection appear upon the face of the declaration, the defendant may demur, move in arrest of judgment, or bring a writ of error. If the contract were misdescribed as being that of the husband, the plaintiff would be

nonsuited under the general issue at the trial, upon the ground of variance between the contract stated in the declaration and that proved. But if the wife be sued alone upon her contract before marriage, she must plead her coverture in abatement, or a writ of *error coram nobis* must be brought; and the coverture in such case cannot be pleaded in bar, or given in evidence upon the trial as a ground of nonsuit; and if she marry, pending an action against her, it will not abate, but the plaintiff may proceed to execution without noticing the husband. But if a *feme covert* be sued upon her supposed contract, made during coverture, she may, in general, plead the coverture in bar, or give it in evidence under the general issue, or under *non est factum*, in the case of a deed. And if the husband and wife be improperly sued jointly on a contract after marriage, the action will fail as to both.

ACTIONS IN FORM EX DELICTO. — Plaintiffs. —

The action for a tort must, in general, be brought in the name of the person whose *legal* right has been affected, and who was *legally* interested in the property at the time the injury was committed.

A *cestui que trust*, or other person having only an *equitable* interest, cannot, in general, sue in the courts of common law against his trustee, or even a third person, unless in cases where the action is against a mere wrong-doer, and for an injury to the actual possession of the *cestui que trust*.

Many of the rules and instances which have been stated, in respect to the person to be made the plaintiff in actions in form *ex contractu*, here also govern and are applicable.

Actions in form *ex delicto* are for injuries to the *absolute* or *relative* rights of persons, or to *personal* or *real property*.

With respect to injuries to the relative rights of persons, in the case of *master and servant*, the master may sue alone for the battery of, or for debauching, his servant, although they are not related, where there is evidence to prove a consequent loss of service; and a father may sue for the seduction of his daughter, although she was married, provided some loss of service can be proved.

The wife, the child, and the servant, having no legal interest in the person or property of the husband, or parent, or master, cannot support an action for an injury to them.

The action for an injury to the absolute rights of persons, as for assaults, batteries, wounding, injuries to the health, liberty, and reputation, can only be brought in the name of the party immediately injured; and if he die, the remedy determines.

The *absolute* or *general* owner of *personal* property, having also the right of immediate possession, may, in general, support an action for any injury thereto, although he never had the actual possession.

An action for an injury to *personalty* may also be brought in the name of the person having only a *special* property or interest of a limited or temporary nature therein. But in this case the general rule seems to be that the party should have had the actual possession.

There are cases in which a party having the *bare possession* of goods, which is *prima facie* evidence of property, may sue a mere wrong-doer who takes or injures them, although it should appear that the plaintiff has not the strict legal title, there being no claim by the real owner, and the defendant having no right or authority from him.

The person in possession of *real property corporeal*, whether lawfully or not, may sue for an injury committed by a stranger, or by any person who cannot establish a better title; and in trespass to land, the person actually in possession, though he be only a *cestui que trust*, should be the plaintiff, and not the trustee. But the rule is otherwise in ejectment, which is an action to try the right, and the fictitious demise must be in the name of the party legally entitled to the possession, although the beneficial interest may be in another, and according to the strict nature of the right; thus, tenants in common *cannot* join, but must *sever* in separate demises, in a declaration in ejectment.

When two or more persons are jointly entitled, or have a *joint legal interest* in the property affected, they must,

in general, join in the action, or the defendant may plead in *abatement*.

Several parties cannot, in general, sue jointly for injuries to the *person* — as for slander, battery, or false imprisonment of both — but each must bring a separate action.

In actions for injuries to *personal property*, joint tenants and tenants in common must join, or the defendant may plead in *abatement*; but parties having several and distinct interests cannot, in general, join.

In actions for injuries to *real property*, joint tenants and parceners must join in real as well as personal actions, or the non-joinder may be pleaded in *abatement*.

Of the consequences of non-joinder in actions, in form *ex delicto*, which are not for the breach of a contract, the rule is that if a party who ought to be joined be omitted, the objection can only be taken by plea in *abatement*, or by way of apportionment of the damages on the trial, and the defendant cannot, as in actions in form *ex contractu*, give in evidence the non-joinder as a ground of nonsuit, on the plea of a general issue, or demur, or move in arrest of judgment, or support a writ of error, although it appears upon the face of the declaration or other pleading of the plaintiff that there is another party who ought to have joined.

The consequences of mis-joinder. — If *too many* persons be made coplaintiffs, the objection, if it appear on the record, may be taken advantage of, either by demurrer in arrest of judgment, or by writ of error; or if the objection do not appear on the face of the pleadings, it would be a ground of nonsuit on the trial.

We have seen that *choses in action ex contractu* are not, in general, assignable at law, so as to enable the assignee to sue in his own name; the same rule prevails in cases of injuries *ex delicto*, either to the person, or to personal or real property.

When one or more of several parties jointly interested in the property at the time the injury was committed is dead, the action should be in the name of the

survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately. But if the parties had separate interests, in respect of which they might have severed in suing, the personal representative of the deceased may maintain a separate action, provided the *tort* was not of such a nature that it died with the person.

We have seen that the right of action for the breach of a *contract* upon the *death* of either party, in general, survives to, and against, the executor and administrator of each; but in the case of *torts*, when the action must be in form *ex delicto*, for the recovery of damages, and the plea not guilty, the rule at common law was otherwise, it being a maxim that *actio personalis moritur cum persona*. By statute this rule has been altered in relation to *personal property*, and in favor of the personal representative of the *party injured*, but if the action can be framed in form *ex contractu*, this rule does not apply.

In the case of *injuries to the person*, whether by assault, battery, false imprisonment, slander, or otherwise, if either party who received or committed the injury die, no action can be supported, either by or against the executors or other personal representatives.

So, also, with respect to *injuries to real property*, if either party die, no action in form *ex delicto* could be supported either by or against his personal representatives. But statutes have introduced a material alteration in the common law doctrine, as well in *favor* of executors and administrators of the party injured as *against* the personal representatives of the party injured, but respects only injuries to *personal* and *real property*, and subject to certain *restrictions* as regards the commencement of an action for such injury within a *short time after the death*, and declaring that the damages to be recovered from an executor or administrator shall be ranked or classed with *simple contract debts*.

In case of *bankruptcy*, when the injury consists in the unlawful detention of any part of the bankrupt's *real* or *personal* property, the assignees may bring actions for the purpose of recovering the possession of value thereof, but for mere

personal torts to the *bankrupt* no right of action passes to the assignee.

In case of insolvency the rules upon this subject appear to be analogous to those in case of bankruptcy.

In the case of marriage the wife, having no legal interest in the person or property of her husband, cannot, in general, join with him in any action for an injury to them, except in an action for a joint malicious prosecution of both, in which they may join in respect of an injury to both, or the husband may sue alone for the injury to himself and expenses of defense.

For injuries to the person, or to the personal or real property of the wife, committed *before* the marriage, when the cause of action would survive to the wife, she *must* join in the action and if she die before judgment therein, it will abate.

But in detinue to recover personal chattels of the wife, in the possession of the defendant before the marriage, perhaps the husband must sue alone. because the law transfers the property to him.

When an injury is committed to the *person* of the wife *during coverture*, the wife cannot sue alone in any case; and the husband and wife *must* join if the action be brought for the personal suffering or injury to the wife, and in such case the declaration ought to conclude to their damage, and not that of the husband alone, for the damages will survive to the wife if the husband die before they are recovered.

With respect to personal property, when the cause of action had only its inception before the marriage, but its completion afterwards, as in case of trover before marriage and conversion during it, or of rent due before marriage and a rescue afterwards, the husband and wife may join, or they may sever in trover and trespass. In detinue it seems the husband could sue alone.

When the cause of action has its inception, as well as completion, after marriage, the husband must sue alone.

In real actions for the recovery of the land of the wife, and

in a writ of waste thereto, the husband and wife must join, but for damages or a tort the husband may sue alone.

If the husband survive, he may maintain an action of trespass, etc., for any injury in regard to the person or property of the wife for which he might have sued alone during the coverture.

If the wife survive, any action for a *tort* committed to her personally, or to her goods or real property before marriage, or to her personal or real property during coverture, will survive to her.

The consequences of a mistake in the proper parties in the case of husband and wife seem to be nearly the same in actions in form *ex delicto* as in those *ex contractu*.

DEFENDANTS. — In *personal* or *mixed* actions, in form *ex delicto*, the person committing the injury, either by himself or his agent, is, in general, to be made the defendant, but *real* actions can only be supported against the claimant of the freehold.

The general rule is that all persons are liable to be sued for their own tortious acts, unconnected with, or in disaffirmance of, a contract.

It is a clear general rule that *corporations* are liable to be sued as such in case or trover for any *torts* they may cause to be committed, and corporations and incorporated companies may be sued in that character for damages arising from the breach by them of a duty imposed by law.

An action cannot be maintained against a judge or justice of the peace, acting *judicially* in a matter within the scope of his jurisdiction, although he may decide erroneously; nor against a juryman, attorney-general, or a superior military or naval officer, for an act done in the execution of their respective offices.

With regard to joint tenants and tenants in common of realty, the general rule appears to be that ejectment will lie by one against the other only in the case of an *actual* ouster; and after recovery in such action trespass for mesne profits may be brought. So, trespass will lie where there has

been a total destruction of the subject-matter of the tenancy in common.

With respect to a tenancy in common of a chattel, the rule is that one tenant in common cannot sue his cotenant if he merely take the chattel away, for, in law, the possession of one is the possession of both, and each has equally a right to take and retain such possession. But if one of the tenants in common destroy, misuse or spoil the chattel, the other may maintain an action at law.

If a *third* person collude with one partner in a firm to injure the other partners in their joint trade, the latter may maintain a joint action against the person so colluding.

All persons who direct or order the commission of a trespass, or the conversion of personal property, or assist upon the occasion, are, in general, liable as *principals*, though not benefited by the act.

On principles of public policy a *sheriff* is liable *civilly* for the tortious acts of his under-sheriff in the course of the execution of their duties.

The distinctions with regard to the liabilities of the owners of *animals* are important, particularly as they affect the form of the action.

The owner of domestic or other animals not naturally inclined to commit mischief, as dogs, horses, oxen, etc., is not liable for any injury committed by them to the person or personal property unless it can be shown that he had previous notice of the animal's mischievous propensities, or that the injury was attributable to some other neglect on his part; and though notice can be proved, the action must be *case*, and not *trespass*.

The liability to an action in respect of *real* property may be for misfeassance, or malfeassance, or for nonfeassance. In these cases, the action should, in general, be against the party who did the act complained of, or against the occupier and not against the owner, if the premises were in possession of his tenant, unless he be covenanted to repair.

An agent or servant, though acting *bona fide* under the

directions and for the benefit of his employer, is personally liable to third persons for any tort or trespass he may commit in the execution of the orders he has received.

An Attorney, acting *bona fide* and professionally, may not be personally liable in cases where he does not exceed the line of his duty.

It is an established rule that an action does not lie against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal, or those actually employed, alone can be sued.

There are some torts which, in legal consideration, may be committed by several, and for which a joint action may be supported against all the parties. Thus a joint action may be brought against several for a malicious prosecution, assault and battery, publishing a libel, etc. ; but if in legal consideration the act complained of *could not have been committed by several persons*, and can only be considered the tort of the actual aggressor, or the distinct tort of each, a separate action against the actual wrong-doer only, or against each, must be brought. Therefore, a joint action cannot be supported against two for verbal slander, etc.

The consequences of mis-joinder or non-joinder. — If several persons be made defendants jointly where the tort *could not*, in point of law, be joint, they may demur, and, if verdict be taken against all, the judgment may be arrested or reversed on a writ of error ; but the objection may be aided by the plaintiffs taking a verdict against only one ; or, if several damages be assessed against each, by entering a *nolle prosequi* as to one after verdict and before judgment.

In other cases where, in point of fact and of law, several persons *might have been jointly guilty of the same offense*, the joinder of more persons than were liable in a personal or mixed action in *form ex delicto* constitutes no objection to a partial recovery, and one of them may be acquitted and a verdict taken against the others.

On the other hand, if several persons jointly commit a tort,

the plaintiff, in general, has his election to sue all or some of the parties jointly, or one of them separately, because a *tort* is, in its nature, a *separate act* of each individual.

In actions in form *ex delicto*, against one only, for a tort committed by several, he cannot plead the non-joinder of the others in abatement or bar, or give it in evidence under the general issue; for a plea in abatement can only be adopted in those cases where regularly all the parties *must* be joined, and not where the plaintiff *may* join them all, or not, at his election.

This rule applies only in actions for torts strictly unconnected with contract.

A recovery against one of several parties who *jointly* committed a tort precludes the plaintiff from proceeding against any other party not included in such action.

As in the case of a breach of a covenant, so in that of torts, the *assignee* of the estate is not liable for an injury resulting from any nuisance or wrongful act committed thereon before he came to the estate; but if he *continues* the nuisance he may be sued for such continuance.

At common law, upon the death of the wrong-doer, the remedy for torts unconnected with contracts, in general, determines; and, until statutory provision, no action could be supported against the executor or administrator of the party who committed the injury. Many of the preceding observations on the rule *actio personalis moritur cum persona*, in its relation to the death of *plaintiffs*, are equally applicable to the case of the death of the wrong-doer.

For injuries to the person, if the wrong-doer die before judgment, the remedy determines, and there is no instance of an action having been supported for such injuries against his personal representatives.

In general, also, no action in form *ex delicto* could, before statutory provision, be supported against an executor for an injury to *personal property* committed by his testator.

For injuries to *real property* no action in form *ex delicto* could, in general, be supported against the personal repre-

representatives of the wrong-doer, but a court of equity will frequently afford relief against the executor of the wrong-doer.

The bankrupt act does not contain any provision enabling a person injured by any personal tort, committed by the bankrupt before his bankruptcy, to obtain remuneration from the funds of the bankrupt, which become vested in the assignees for the benefit of the creditors.

The same rule holds in the case of an insolvent as in the instance of a bankrupt with regard to a claim for *damages* for a tort committed by the insolvent.

In case of marriage, action for torts committed by a woman before her marriage must be brought against the husband and wife jointly. So, also, for torts committed by the wife *during* coverture. But the plaintiff cannot, in the same action, proceed also for slander or other tort committed by the husband alone; nor can the husband and wife be sued jointly for slander by both.

The consequences of mistake, in the cases of *baron and feme*, are, if the wife be sued alone for her tort before or after marriage, she must plead her coverture in abatement, and cannot otherwise take advantage of it; but if the husband and wife be sued jointly for torts of which they could not in law be jointly guilty, as for slander by both, if the objection appear on the face of the declaration the defendant may demur, move in arrest of judgment, or support a writ of error.

FORMS OF ACTIONS.

It is no longer necessary, as formerly, to state the whole cause of action and form of complaint in the writ, yet it is still necessary for the practitioner to decide on the proper *form of action* to be adopted, and to state it, though very concisely, in the writ, and which form of action must afterwards be adhered to in the declaration, or the latter will be set aside for irregularity.

Actions are, from their subject-matter, distinguished into *real*, *personal*, and *mixed*.

Real actions are for the specific recovery of real property only and in which the plaintiff, then called the defendant, claims title to lands, tenements, or hereditaments, in fee-simple, fee-tail, or term for life — such as writs of right, formedon, dower, etc.

Personal actions are for the recovery of a debt or damages, for the breach of a contract, or a specific personal chattel, or a satisfaction in damages for some injury to the personal or real property.

Mixed actions partake of the nature of the other two, the plaintiff proceeding for the specific recovery of some real property, and also for damages for an injury thereto.

Personal actions are in form *ex contractu* — in other words, for breach of contract; or *ex delicto*, for wrongs unconnected with contract.

Actions *ex contractu*, or upon contracts, are principally: *assumpsit*, *debt*, *covenant*, and *detinue*.

Actions *ex delicto*, or for wrongs, or torts, are: *case*, *trover*, *replevin*, and *trespass vi et armis*.

ACTIONS IN FORM EX CONTRACTU. — *Assumpsit* is an action for the recovery of damages for the non-performance of a parol or simple contract; or, in other words, a contract not under seal, nor of record. It is not sustainable, however, unless there has been an *express contract*, or unless the law will *imply* a contract.

It is not judicious to adopt this form of action where the plaintiff may declare in tort in cases where, by suing *ex contractu*, the right of set-off may attach.

The general issue or most general plea in this action is *non-assumpsit*.

Debt is an action so called because it is a legal consideration for the recovery of a debt *eo nomine* and in *numero*, and though *damages* are in general awarded for the detention of the debt, in most instances they are merely nominal.

It is a more extensive remedy for the recovery of money than *assumpsit* or *covenant*, for *assumpsit*

is not sustainable upon a specialty, and *covenant* does not lie upon a contract not under seal; whereas *debt* lies to recover money due upon legal liabilities, or upon simple contracts, express or implied, written or verbal, and upon contracts under seal or of record, on statutes by a party grieved, or by common informer, and whenever the demand is for a sum certain, or capable of being reduced to a certainty.

Though debt lies, as a general rule, for a sum certain, yet it is the proper remedy for a penalty imposed by statute, though the amount is uncertain, and is to be fixed by the court between certain sums.

The action of debt cannot be supported for a debt payable by installments till the whole of them be due, though for rent payable quarterly or otherwise, or for an annuity, or on stipulation to pay a certain amount on one day and a certain amount on another, debt lies on each default, and even where one sum is payable by installments, if the payment be secured by a penalty, debt is sustainable for such penalty.

Formerly the *plea* of the general issue in this action was *nil debet*. But now, the actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant pleads "that he *never was* indebted in manner and form as in the declaration alleged," etc.; in debt on specialty, the plea denying the execution of the deed set out in the declaration is *non est factum*; and to debt on record, *nul tiel record*.

Covenant is an action and remedy provided by law for the recovery of damages for the breach of a covenant, or contract under seal.

Covenant and debt are concurrent remedies for the recovery of any money demand where there is an express or implied contract in an instrument under seal to pay it; but, in general, debt is the preferable remedy, as in that form of action the judgment is final in the first instance if the defendant do not plead.

Covenant is the *peculiar* remedy for the non-performance

of a contract made under seal where the damages are unliquidated and depend in amount on the opinion of the jury, in which case neither debt nor *assumpsit* can be supported.

The usual plea in this action is *performance with leave*, etc.

Detinue is the action, and only remedy by suit at law, for the recovery of a personal chattel in specie, except in those instances where the party can obtain possession by replevying the same, and by action of replevin.

This action is somewhat peculiar in its nature, and it may be difficult to decide whether it should be classed amongst forms of action *ex contractu*, or should be ranked with actions *ex delicto*.

The right to join detinue with debt, and to sue in detinue for not delivering goods in pursuance of the terms of a bailment to the defendant, seem to afford ground for considering it rather as an action *ex contractu* than an action of tort.

On the other hand, it seems that detinue lies, although the defendant wrongfully became the possessor thereof in the first instance, without any relation to any contract.

This action is only sustainable for the recovery of a specific chattel, and not for real property. The goods for which it is brought must be distinguishable from other property, and their identity ascertainable by some certain means, so that, if the plaintiff recover, the sheriff may be able to deliver the goods to him.

It seems to be a general rule that the plaintiff must have a general or special property in the goods *at the time the action was commenced* in order to maintain detinue.

The gist or main point of this action is the wrongful detainer, and not the original taking.

In pleading it is usual to state that the defendant acquired the goods by *finding*, except where he is declared against as a bailee; yet that allegation is not traversable, and it was observed in a case that, if detinue could not be supported because the original case was tortious, a person might be greatly in-

jured and have no adequate remedy; for in trover damages only can be recovered, and the thing detained may be of such a description that a judgment merely for damages would be an inadequate satisfaction.

With respect to the *pleadings* in this action, *more certainty* is necessary in the *description* of the chattels than in an action of trover or replevin.

The plea of the general issue in this action is *non detinet*.

This action is now not much used, having given place to that of trover in practice.

ACTIONS IN FORM EX DELICTO.—Personal actions in form *ex delicto*, and which are principally for the redress of wrongs unconnected with contract, are: case, trover, replevin, and trespass *vi et armis*.

Mixed actions are: ejectment, waste, etc.

If the injury be *forcible* and occasioned *immediately* by the act of the defendant, trespass *vi et armis* is the proper remedy; but if the injury be not in legal contemplation *forcible*, or *not direct* and *immediate* on the act done, but only *consequential*, then the remedy is by *action on the case*.

Injuries *ex delicto* are, in legal consideration, committed *with force*, as assaults, batteries, etc., or *without force*, as slander, etc. They are also either *immediate and direct*, or *mediate and consequential*.

Force is, in legal consideration, either *implied* by law or *actual*; force is implied in every trespass, *quare clausum fregit*.

The distinction is material; an injury is considered *immediate* when the act complained of *itself* and not merely a consequence of that act, occasions the injury.

But where the damage or injury ensued not directly from the act complained of, it is termed *consequential* or *mediate*, and cannot amount to a *trespass*.

Where the act occasioning an injury is unlawful, the intent of the wrong-doer is immaterial.

It is a general rule that if a party be in the prosecution of a legal act an action does not lie for an injury resulting

from an inevitable or unavoidable accident which occurs without *any* blame or default on his part.

Action on the case lies, generally, to recover damages for torts not committed with force, actual or implied; or, having been occasioned by force where the matter affected was not tangible, or the injury was not immediate but consequential, in which cases trespass is not sustainable.

Case is the proper remedy for an injury to the *absolute rights of persons* — not immediate, but consequential; also for injuries to the *relative* rights of persons, except where really committed with force, when *trespass* is the proper remedy.

For injuries to personal property, not committed with force, or not immediate, or where the plaintiff's right thereto is in reversion, *case* is also the proper remedy.

Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in *assumpsit*, in which the promise is stated as the gist of the action.

But where, from a given state of facts, the law raises a legal obligation and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law to do the act, still an action on the case, founded in tort, is the more proper form of action, in which the plaintiff, in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and damage resulting from that breach.

Where injuries to *real property corporeal* are immediate, and committed on the land, etc., in the possession of the plaintiff, the remedy is trespass; but where the injury is not immediate, but consequential, or where the plaintiff's property is only in reversion, and not in possession, the action should be in case.

The *plea* in this action is principally the general issue *not guilty*.

Action of trover, or *conversion*, was, in its origin, an action of trespass on the case for the recovery of damages

against a person who had *found* goods and refused to deliver them, on demand, to the owner, but *converted* them to his own use, from which word, *finding* (trover), the remedy is called an action of trover.

The injury lies in the conversion and deprivation of the plaintiff's property, which is the *gist* of the action, which action is for the recovery of *damages* to the extent of the value of the thing converted.

The object and result of the suit are not the recovery of the thing itself, which can only be recovered by action of detinue or replevin.

Lord Mansfield thus defines this action: "In *form* it (i. e., the trover) is a fiction; in *substance* it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use."

The action is confined to the conversion of goods or personal chattels.

To support this action the plaintiff must, at the time of the conversion, have had a complete *property*, either *general* or *special* in the chattel, and also *actual possession*, or the *right* to the *immediate possession* of it.

In the case of a conversion by wrongfully taking, it is not necessary to prove a demand and refusal; proof of the wrongful act is sufficient to establish the conversion, but a demand and refusal are necessary in *some cases*, as where the defendant became, in the first instance, lawfully possessed of the goods, etc.

For a wrongful taking of goods trover is, in general, a concurrent remedy with trespass; but the converse does not hold, for trover may often be brought where trespass cannot.

The general issue in this action is, *not guilty*.

Action of replevin is that whereby the owner of goods, unjustly taken and detained from him, may regain possession thereof through the medium of, and upon application to, the sheriff, upon giving him security to prosecute an action against the person who seized. It is principally used in cases of dis-

tress, but it seems that it may be brought in any case where the owner has goods taken from him by another.

This action is of two sorts: in the *detinet*, where goods are still detained by the person who took them, to recover the value and damages; and in the *detinuit*, for the recovery of *damages* only, for the taking of the goods, and for the detention till the time of the replevy, and not the value of the goods themselves. The former is now obsolete.

Replevin can only be supported for taking personal chattels, and not for taking things attached to the freehold, and which are, in law, considered fixtures, and cannot be delivered to the distrainer upon a writ of *retorno habendo*.

To support replevin the plaintiff must, at the time of the caption, have had either the general property in the goods taken or a special property therein.

If the plaintiff has not the immediate right of possession, replevin cannot be supported, but the party must proceed by an action on the case.

In order to maintain replevin the plaintiff must prove either a tortious taking, or a tortious detention of the property replevied.

The general issue in this action is *non-cepit*, but under this the defendant cannot dispute the plaintiff's property, which must be denied by a special plea.

Action of trespass only lies for injuries committed with force, and, generally, only for such as are *immediate*, and the intention of the wrong-doer is, in general, immaterial in this action.

The term trespass, in its most extensive signification, includes every description of *wrong*, on which account an action on the case has been usually called "trespass on the case," but technically it signifies an injury committed *vi et armis*.

The difference between an action of *trespass* and an action on the case is that in the former the plaintiff complains of an immediate wrong, and that in the latter of a wrong that is the consequence of another act.

The gist of this action is the injury to the possession, and the general rule is that unless at the time the injury was committed the plaintiff was in actual possession, trespass cannot be supported, and though the title may come in question, yet it is not essential to the action that it should.

Actual and exclusive possession without a legal title is sufficient against a wrong-doer, or a person who cannot make out a title, *prima facie* entitling him to the possession, or show any right or authority from the real owner.

No action will lie against a judge for what he does *judicially*, though it were done maliciously; at least he would not be liable in trespass in such case. But when an inferior court is guilty of an *excess* of jurisdiction, or has no *jurisdiction* over the subject-matter, *trespass* may be supported for anything done under such proceeding.

The want of jurisdiction in a court rendering a judgment renders the judgment *coram non judice* and void, and the magistrate and all others concerned in enforcing the judgment would be trespassers.

The general issue in this action is, *not guilty*.

Action of ejectment lies for the recovery of the possession of *real* property, in which the lessor of the plaintiff has the *legal interest* and a *possessory right*, not barred by the statute of limitation. It is not a *real* action, nor a mere *personal* action, but is what is termed a *mixed* action, partly for the recovery of the thing or property itself, and partly to recover damages, which, in general, are merely nominal, but in some cases between landlord and tenant such damages are, in effect, the full amount of the mesne profits up to the time of trial.

Ejectment is an action founded in fiction, being brought in the name of a nominal plaintiff, whose supposed right to the possession is founded on a supposed demise made to him by the party or parties really entitled to the possession of the property.

The action cannot be commenced until the real plaintiff's *right of entry* has accrued.

Mere nominal damages and costs only being recoverable in this action, in order to complete the remedy for damages when the possession has been long detained, an action of trespass for the *mesne profits* must, in general, be brought after the recovery in ejectment.

With respect to the title, a party having a right of entry, whether his title be in fee-simple, fee-tail, or in copyhold, or for life, or years, may support an action of ejectment; but the right of possession must be of some duration and exclusive; hence it cannot be supported where a party has merely a license to use land, or for a standing place, etc.

The general rule governing this action is that the lessor of the plaintiff must recover upon the *strength of his own title*, and, of course, he cannot in general found his claim upon the insufficiency of the defendant's, for possession gives the defendant a right against every person who cannot show a sufficient and better title, and the party who would change the possession must, therefore, first establish a legal title.

This action is only sustainable for what, in fact, or in point of law, amounted to an ouster or dis-possession of the lessor of the plaintiff. But such *ouster* may and usually is, by merely *holding over*; and an immediate tenant may be sued for the holding over by his under-tenant, though against his will.

If a tenant under-let, and at the end of his term his sub-tenant refuse to quit, the original lessor may support ejectment against *both*, and both are liable to pay mesne profits.

Action for mesne profit is, in *form*, an action of trespass *vi et armis*, but in *effect*, to recover the rents and profits of an estate as a satisfaction to the real plaintiff for the injury he has sustained by being kept out of possession, and the mesne profits, which, in general, not being included in the verdict in the ejectment, the law has provided this remedy for that injury; the action of ejectment, as at present conducted, though nominally a *mixed* action, being altogether a mere fiction, it being brought by a *nominal* plaintiff against a *nominal* defendant for a *supposed* ouster, merely *nominal* damages are given.

In general, any person found in possession after a recovery in ejectment, is liable to the action and it is no defense that he was on the premises merely as an agent, and under the license of the defendant in ejectment, for no man can license another to do an illegal act; but, generally, the person against whom the judgment in ejectment has been given ought to be made the defendant in this action.

Mistake in the form of action.— When the objection to the form of the action is substantial, and appears *upon the face of the declaration*, without regard to *extrinsic facts*, it may be taken advantage of by demurrer, or by motion in arrest of judgment, or by writ of error.

When the objection to the form of action *does not appear on the face of the pleadings*, it can only be taken as a ground of nonsuit, in which case the defendant will be entitled to his costs.

If by either of these means the plaintiff fail in his action, and judgment be given against him for that reason, and not upon the merits, he is at liberty to commence a fresh action and the defendant cannot plead in bar the proceedings in the first ineffectual suit.

Joinder of actions.— Where the plaintiff has two *causes of action*, which may be joined in one action, he ought to bring one action only, and if he commence two actions, he may be compelled to consolidate them and to pay the costs of the application.

The joinder in action often depends on the form of the action, rather than on the *subject-matter* or *cause of action*; thus, in an action against a carrier for the loss of goods, if the plaintiff declare in *assumpsit* he cannot join a count in trover, as he may if he declare against him in case, for the joinder depends on the *form* of the action.

When the *same plea* may be pleaded, and the *same judgment* given on all the counts of the declaration, or whenever the *counts* are of the *same nature*, and the *same judgment* is to be given on them all, though the pleas be different, as in the case of debt upon bond and on simple contract, they may be joined.

Perhaps the latter — that is, the *nature* of the cause of action — is the best test or criterion by which to decide as to the joinder of counts. By this rule we may decide, in general, what forms of action may be joined in the same declaration.

It is a general rule that actions in form *ex contractu* cannot be joined with those in form *ex delicto*.

A person cannot in the same action join a demand *in his own right* and a demand as *representative* of another, or *autre droit*, nor demands against a person on his *own* liability and on his liability in his *representative* capacity.

Election of actions. — The party injured frequently has an election of several remedies for the same injury, and the due exercise of this election being of great importance, it may be useful to state the principal points which direct the choice of several remedies.

A strict legal title is essential to the support of some remedies, but in others the plaintiff's bare possession of the property affected is sufficient. Where the title of the plaintiff may be doubtful, it is, in general, advisable to adopt the latter description of remedy.

Of bail and process in actions in form *ex delicto*. — In *case*, *trover*, *detinue*, and *trespass* the defendant cannot be arrested without a special order of the court or judge, and it is not usual to grant such order except where there has been an outrageous battery, or the defendant is about to quit the kingdom; therefore, in cases where it may be material to have the security of *bail*, the action should, if possible, be framed in *assumpsit* for money had and received, etc. Where, however, the defendant had been already arrested, the form of action must correspond with the affidavit, to hold to bail, and the form of action stated in the *capias* or other process.

The number of parties. — We have seen that in an action in form *ex contractu*, if a person who ought to be made *co-plaintiff* be omitted, it is a ground of nonsuit, etc., except in the case of executors and administrators, whereas in actions in form *ex delicto* the non-joinder of a party who should have been a *co-plaintiff* can only be pleaded in abatement; hence

the latter form of action is preferable, if it can be adopted, where there is reason to doubt who should be joined as a plaintiff.

Number of the causes in action. — Where the plaintiff has several demands of a similar kind, recoverable in different forms of action, he frequently may, and then he ought to, proceed for the whole in that form of action which will embrace his various claims.

Of the defense. — By a judicious choice of the remedy the defendant may be frequently precluded from availing himself of a defense which he might otherwise establish.

The venue. — In some cases there may be two or more actions in effect for the same injury, the one *local* and the other *transitory*; consequently the latter form of action should be adopted where it may be advisable to try the cause out of the county where the estate is situated.

As to the evidence, it is frequently more convenient that the action should be trespass than case, because, if laid in trespass, no nice points can arise upon the evidence by which the plaintiff may be defeated upon the form of the action, as there may, in many instances, if case be brought. Very often the form of action, by driving the defendant to plead more specially, may narrow the plaintiff's evidence.

Of costs. — In actions in form *ex contractu* the plaintiff is, in general, entitled to *full costs*.

The judgment and execution. — The action of debt is frequently preferable to *assumpsit* or covenant, because the judgment in debt by *nisi dicit*, etc., is, in general, final, and execution may be issued immediately without the expense and delay of a writ of inquiry. Replevin or detinue is preferable to trover when it is important to obtain the goods themselves.

The circumstance of a party having elected one of several remedies by *action* will not, in general, preclude him from abandoning such suit, and, after having duly discontinued it, he may adopt any other remedy.

The plaintiff cannot, in general, bring a fresh species of

action for the same cause whilst the former is depending, or after it has been determined by a verdict.

PLEADING IN GENERAL.

Pleading is the statement in a logical and *legal form* of the *facts* which constitute the plaintiff's cause of action or the defendant's ground of defense.

The grand object contemplated by the system is the production of a certain and material issue between the parties upon some important part of the subject-matter of dispute between them.

THE FACTS NECESSARY TO BE STATED. —

In general, whatever circumstances are necessary to constitute the cause of complaint, or the ground of defense, must be stated in the pleadings, and all beyond is surplusage; *facts* only are to be stated, and not arguments or inferences, or matters of law; in which respect the pleadings at law differ materially from those in equity.

There are *some facts* of such a *public* or *general* nature that the courts *ex officio* take notice of them, and which, consequently, ought not to be unnecessarily stated in pleading; such are public matters relating to the King and to Parliament, public statutes and the facts which they recite, ecclesiastical, civil, and marine laws, common law rights and duties, and general customs, days of the week, etc., on which particular days fall, the divisions of the country into counties, etc., the meaning of English words and terms of art according to their ordinary acceptation, of their own course of proceedings, the privileges they confer on their officers, etc.

Where the law presumes a fact, or it is necessarily implied, it need not be stated.

Where the law presumes the affirmative of any fact, the negative of such fact need not be proved by the party averring it in pleading.

Illegality in a transaction is never presumed; on the contrary, everything is presumed to have been legally done till the contrary is proved.

It is a general rule of pleading that matter which should come more properly from the other side need not be stated — i. e., it is enough for each party to make out his own case or defense.

Although any particular fact may be the gist of a party's case, and the statement of it indispensable, it is still a most important principle of the law of pleading that, in alleging the fact, it is unnecessary to state such circumstances as *merely tend to prove the truth* of it. The dry allegation of the fact, without detailing a variety of minute circumstances which constitute the evidence of it, will suffice.

The object of the pleadings is to arrive at a specific issue upon a given and material fact, and this is attained, although the *evidence* of such fact to be laid before the jury be not specifically developed in the pleading.

Though the general rule is that facts only are to be stated, yet there are some instances in which the statement in the pleading is valid, though it does not accord with the real facts, the law allowing a fiction, as in the action of ejectment, in which the statement of the demise to the nominal plaintiff is fictitious. So in trover and detinue, the usual allegation that the defendant *found* the goods rarely accords with the fact, and where the number, quantity, species, or value of a thing, need not be proved precisely as laid, it is usual to state a greater number than really was the case in order to admit of greater latitude in evidence; but except in these and a few other well-known instances, established and recognized in pleading for the convenience of justice, the pleading matter known to the party to be untrue is censurable.

The rule relating to duplicity or doubleness tends more than any other to the production of a *single* issue upon the *same* subject-matter of dispute — the real object of the science of pleading. It precludes both parties from stating or relying upon more than one *matter* constituting a sufficient ground of action in respect to the same demand, or a sufficient defense

to the same claim, or an adequate answer to the precedent pleading of the opponent.

The plaintiff cannot, by the common law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which, independently of the other, amounts to a good cause of action in respect of such demand. And the same count must not contain two promises in respect to the same subject-matter.

The defendant could not, in answer to a single claim, rely on several distinct answers, nor can he now do so in one plan.

At common law the declaration may comprise several counts upon different distinct demands of the same nature, or distinct counts upon the same claim.

And several distinct facts or allegations, however numerous, may be comprised in the same plea, or other pleading, without amounting to the fault of duplicity, if one fact, or some of the facts, be but dependent upon, or be mere inducement or introduction to, the others, or if the different facts form together but one connected proposition, or entire matter or point.

To avoid any unnecessary statement of facts, as well as prolixity in the statement of those which may be necessary, is of the greatest importance in pleading, as the statement of immaterial or irrelevant matter or allegations is not only censurable as creating unnecessary expense, but also frequently affords an advantage to the opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary.

If the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage, and it need not be proved; nor will it vitiate even on a special demurrer, it being a maxim that *utile per inutile non vitiatur*.

But if the very ground of the action be misstated, that will

be fatal, for then the case declared on is different from that which is proved, and the plaintiff must recover *secundum allegata et probata*.

The introduction of unnecessary words of form will not vitiate the rest of a replication which is good.

Surplusage is never assignable as cause of demurrer; but surplusage, in tendering an *issue* or in *other part of pleading*, tending to embarrass the opponent, may be assigned specially as cause of demurrer.

The general rule is that a pleading inconsistent with itself, or repugnant, is objectionable.

Mode of stating facts. — The principal rule is that they must be set forth with *certainty*.

Less certainty is requisite when the law presumes that the knowledge of the facts is more *properly or peculiarly* in the opposite party.

Where a subject comprehends multiplicity of matter and a great variety of facts, there, in order to avoid *complexity*, the law allows general pleading.

In general, *pleadings* must not be insensible or repugnant, nor ambiguous or doubtful in meaning; not argumentative, nor in the alternative.

Rules for construing pleadings. — It is a maxim that everything shall be taken most strongly against the party pleading where the meaning of the words is equivocal.

But the maxim must be received with this qualification: that the language of the pleading is to have a reasonable intentment and construction, and where an expression is capable of different meanings, that shall be taken which will *support* the declaration.

The division of pleadings, or the *parts* of pleadings, are arrangeable under two heads: the *regular parts* being those which occur in the ordinary course of a suit, and the *irregular or collateral parts* being those which are occasioned by mistakes in the pleadings on either side.

The regular parts of pleading are: first, the *declaration*, or count; second, the *plea*; third, the *replication*;

fourth, the *rejoinder*; fifth, the *sur-rejoinder*; sixth, the *re-butter*; seventh, the *sur-rebutter*; eighth, *pleas puis darien continuance*, where the matter of defense arises *pending* the suit.

The irregular or collateral parts of pleading are: first, *demurrers* to any part of the pleadings above mentioned; second, *demurrers to evidence* given at trials; third, *bills of exception*; fourth, *pleas in scire facias*; fifth *pleas in error*.

The general requisites or qualities of a plea are: first, it must be *single* and *avoid duplicity*; second, it must be *direct* and *positive*, not argumentative; third, it must have convenient *certainty of time, place, and persons*; fourth, it must answer the plaintiff's *allegations* in everything *material*; fifth, it must be pleaded so as to be *capable of trial*.

The declaration is a specification, in a methodical and legal form, of the circumstances which constitute the plaintiff's *cause of action*, which necessarily consists of the statement of a legal *right* — or, in other words, a right recognized in courts of law, not merely in a court of equity — and of an *injury* to such right, remediable at law by action, as distinguished from the remedy by bill in equity.

The general requisites or qualities of a declaration are: I. That it correspond with the process, and, in bailable actions, with the affidavit to hold to bail — with respect to, first, the *names* of the parties to the action; secondly, the *number* of such parties; thirdly, the *character* or *right* in which they sue or are sued; fourthly, the *cause* and *form* of action. II. That it contains a statement of all the facts necessary, in point of law, to sustain the action, and no more. III. That these circumstances be set forth with certainty and truth — that is, first, who are the *parties* to the suit; secondly, a *time* when every material or traversable fact happened in personal actions; thirdly, a *place* should be alleged where every material and traversable fact occurred; fourthly, it is still more material that certainty and accuracy be observed in the *more substantial parts* of the declaration, which state the *cause of action itself*.

The several parts and particular requisites of declarations are: first, the title of the declaration as to the *court*; secondly, the title of the declaration as to the *time* when it is filed or delivered; thirdly, the *venue* in the *margin*; fourthly, the *commencement*; fifthly, the *body*, according to the form of action — e. g., in *assumpsit*, six points are principally to be attended to, namely, the *inducement*, *consideration*, *promise*, *averments*, *breach*, and *damages*; sixthly, the *conclusion*; seventhly, the *proport* of deeds, probates, letters of administration, etc.; eighthly, the statement of *pledges* to be discontinued; ninthly, other *miscellaneous* points.

The cause of action in every case consists of three different points: the *right*, the *injury*, and the consequent *damages*.

The inducement in an action of *assumpsit* is in the nature of a preamble, stating the circumstances under which the contract was made, or to which the consideration has reference.

The consideration stated should appear to be *legally sufficient* to support the promise for the breach of which the action is brought.

In declaring upon *bills of exchange* and *promissory notes*, and some other legal liabilities, the mere statement of the liability which constitutes the consideration is sufficient; but in other cases of simple contracts it is necessary that the declaration should disclose a consideration, which may consist of either benefit to the defendant or detriment to the plaintiff, or the promise will appear to be *nudum pactum*, and the declaration will be insufficient.

An executed consideration consists of something *past* or *done* before the making of the promise.

Executory considerations are those to be yet performed, the *promise* having been made, or the thing done.

Concurrent considerations occur in the case of mutual promises, and partake of the nature of the preceding two. The plaintiff's *promise* is *executed*, but the *thing* which he has engaged to perform is *executory*, as in promises to marry, etc.,

Continuing considerations are such as are executed in part only.

The three last classes are sufficient to support a contract but void for other reasons.

Great accuracy is required in the statement of the *consideration*, which, in an action of *assumpsit*, forms the basis of the contract, and if any error appear to have been made in describing it, the consequence will be that the whole contract is misdescribed.

When *no consideration* is stated in the declaration, or when that which is stated is *clearly insufficient* or *illegal*, the defendant may either demur, or move in arrest of judgment, or support a writ of error.

The perfection of pleading consists in combining brevity with the requisite certainty and precision.

The contract must be stated correctly, and if the *evidence differ from the statement* the whole foundation of the action fails, because the contract is entire in its nature, and must be proved as laid. In this respect there is a material distinction between the statement of *torts* and of contracts, the former being divisible in their nature, and the proof or part of the tort or injury being, in general, sufficient to support the declaration.

A contract or written instrument should be stated according to its legal effect. The party is not *compelled* to follow the precise form of words in which the contract was made; it suffices if he states its true legal effect and operation.

Averment signifies a positive statement of facts in opposition to argument or inference.

Variance is a disagreement or difference between two points of the same legal proceeding, which ought to agree. It is between the writ and declaration, or the allegation and the proof.

The common counts in *assumpsit* are: the *indebitatus* count, the *quantum meruit*, the *quantum valebat*, and the *account stated*.

In actions for torts or *wrongs* the declaration should state the *matter* or *thing* affected, the plaintiff's *right* thereto, the *injury*, and the *damages* sustained by the plaintiff.

In actions brought for *injuries* to *real property*, the *quality* of the realty, as whether it consists of houses, lands or other *corporeal* hereditaments, should be shown.

In actions for injuries or taking away *goods* or *chattels*, it is, in general, necessary that their *quality*, *quantity* or *number*, and *value* or price, be stated.

In trover, trespass, and case, *damages* only being recoverable, less detail is required than in detinue and replevin, for by these latter forms of action the plaintiff can claim or recover *the goods themselves*.

In personal actions, damages are the gist of the suit; in *real* actions, the *right* or *title* forms the prominent subject of inquiry.

In an action on the *case*, founded on an express or implied *contract*, the declaration must *correctly state the contract*, or the particular duty or consideration from which the liability results and on which it is founded; and a variance in the description of a *contract*, though in an action *ex delicto*, may be as fatal as in an action in form *ex contractu*.

Injuries *ex delicto* are either committed with or without *force*, and are immediate or *consequential*; they may also arise from malfeasance, misfeasance, or non-feasance.

In some actions the *scienter* — i. e., the intent — being material, must be *alleged* and *proved*.

In general, when the act occasioning damage is in itself unlawful, without any other extrinsic circumstance, the intent of the wrong-doer is immaterial, in point of law, though it may enhance the damages.

In an action *ex delicto*, upon *proof of part only of the injury charged*, the plaintiff will be entitled to recover *pro tanto*, provided the part which is proved afford, *per se*, a sufficient cause of action; for *torts* are, generally speaking, divisible.

The statement of the *time* of committing injuries *ex delicto* is seldom material; it may be proved to have been

committed either on a day anterior or subsequent to that stated in the declaration.

The *place* is only material in *local* actions, or where the precise *situation*, or, rather, *description* of the land, houses, etc., is particularly stated, as in trespass and replevin.

Damages are either general or special. — General damages are such as the law *implies* or presumes to have accrued from the wrong complained of. Special damages are such as *really* took place and are not implied by law.

Presumptions of law are not, in general, to be pleaded or averred as facts.

In the case of libel or slander, great care must be taken in setting out the *particular libellous matters or words complained of*. The libel itself, or slanderous words, must be set out in *haec verba*, or as uttered.

The claim of conusance or cognizance of a suit is defined to be an intervention by a *third person*, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of the claimant's court.

It is in form a question of jurisdiction between the two courts, and not between the plaintiff and defendant, as in the case of a plea to the jurisdiction, and, therefore, it must be demanded by the party entitled to conusance, or by his representative.

A plea to the jurisdiction must be pleaded in person, but a claim of conusance may be made by attorney.

Defense is defined to be the *denial* of the truth or validity of the complaint, and does not merely signify a *justification*.

Oyer is a prayer or petition, recited or entered into in pleading, that the party may *hear* read to him the deed, etc., stated in the pleadings of the opposite party, and which deed is by intendment of law in court when it is pleaded with a *proferet*.

Imparlance, in its most general signification, means *time* given by the court to either party to answer the pleading of his opponent, as either to plead, reply, rejoin, etc., and is

said to be nothing else but the continuance of the cause till a further day.

PLEAS DILATORY AND PLEAS PEREMPTORY constitute the general division of *pleas*.

Dilatory pleas are to the *jurisdiction*, to the *disability of the person*, to the *count or declaration*, and to the *writ*, the three last being generally termed *pleas in abatement*.

Pleas to the jurisdiction. — Where the court has no jurisdiction at common law, or it has been taken away by act of Parliament, such want of jurisdiction may, in general, be pleaded in *bar*, or given in evidence under the general issue and is not properly the subject of a plea in abatement.

In all pleas to the jurisdiction of the *superior* courts, it must be shown that there is another court in which justice may be effectually administered; for if there be no other mode of trial, that alone would give the superior court jurisdiction.

Peremptory pleas are those which lead to an issue which settles the dispute, and are called *pleas in bar* of the action.

Pleas in abatement. — Whenever the subject-matter of the plea of the defense is that the plaintiff cannot maintain *any action at any time*, whether present or future in respect of the supposed cause of action, it may, and usually must, be pleaded in *bar*; but the matter which merely defeats the *present* proceeding, and does not show that the plaintiff is *forever* concluded, should, in general, be pleaded in *abatement*.

Pleas in abatement are divided into those relating —

- I. To the disability of the person suing or being sued, as
 - { 1. Of the plaintiff;
 - { 2. Of the defendant.
- II. To the count or declaration.
- III. To the writ, viz.:
 - 1. To the form of the writ, viz.:
 - { 1. Matter apparent on the face of it.
 - { 2. Matter *DEHORS*.
 - 2. To the action of the writ.

As pleas in abatement do not deny, and yet tend to delay, the trial of the merits of the action, great accuracy and pre-

cision are required in framing them. They should be certain to every intent, and be pleaded without any repugnance.

As dilatory pleas rarely affect the merits of the suit, and object mere matter of form, they constitute an exception to the general principle of pleading — that a *plea* must either traverse or confess and avoid the alleged cause of action.

Pleas in bar go to the *merits* of the case, and deny that the plaintiff has any cause of action.

They are of *two* kinds, as well in action on contracts as for torts, viz.: first, they *deny* that the plaintiff *ever* had the cause of action complained of; or, secondly, they *admit* that he *once had* a cause of action, but insist that it *no longer subsists*, having been determined by some *subsequent* matter. They are also either to a whole or to a part of the declaration.

The true object of pleading is to apprise the adverse party of the ground of defense, in order that he may be prepared to contest it, and not be taken by surprise.

It is well settled that, in an action for a libel or slanderous words, the defendant cannot, *under the general issue*, give in evidence the *truth* of the matter, or any part of it, *even in mitigation of damages*, but *must justify specially*.

It is a matter of prudence, depending on the facts of each case, whether or not to plead a justification.

Pleas in bar must either deny or confess and avoid the matter alleged in the plaintiff's declaration.

It is a general rule at common law that matters in mitigation of damages, etc., which cannot be specially pleaded, may be given in evidence under the general issue.

The general issue or general plea is what denies at once the whole declaration without offering *special* matter.

Analytical table of the defenses to actions on contracts not under seal, the sub-divisions being nearly the same in each form of action:

- I. Deny that there ever was cause for action.
 - 1. Deny that a sufficient contract was ever made.
 - 1. That no contract was, in fact, made.
 - 2. Incompetency of plaintiff to be contracted with.
 - Plaintiff an alien enemy at time of contract.
 - 3. Defendant incapable of contract.
 - 1. Infancy.
 - 2. Lunacy, Drunkenness, etc.
 - 3. Coverture.
 - 4. Duress.
 - 4. Insufficiency of consideration.
 - 1. Inadequacy of consideration.
 - 2. Illegality of consideration, viz.:
 - At common law, and
 - By different statutes.
 - 5. Contract obtained by fraud.
 - 6. The act to be done illegal or impossible.
 - 7. The form of contract insufficient.
 - 1. At common law.
 - 2. By statute.
 - As statute against frauds.
 - 8. No sufficient stamp.
 - 2. Admit a sufficient contract, but show that before breach there was
 - 1. A release.
 - 2. Parol discharge.
 - 3. Alteration in terms of contract by consent.
 - 4. Non-performance by plaintiff of a condition precedent.
 - 5. Performance, payment, etc. [alteration, etc.]
 - 6. Contract became illegal or impossible to perform.
- II. Admit that there was no cause of action, but avoid it by showing subsequent or other matter.
 - 1. Plaintiff no longer entitled to sue.
 - 1. An alien enemy.
 - 2. Attainted.
 - 3. Outlaw.
 - 4. A bankrupt, insolvent debtor, etc.
 - 2. Defendant no longer liable to be sued.
 - 1. A certified bankrupt.
 - 2. An insolvent debtor.
 - 3. Debt recoverable only in a court of conscience.
 - 4. Cause of action discharged.
 - 1. By payment.
 - 2. Accord and satisfaction.
 - 3. Foreign attachment.
 - 4. Tender.
 - 5. Account stated and negotiable security taken by plaintiff.
 - 6. Arbitrament.
 - 7. Former recovery.
 - 8. Higher security given.
 - 9. A release.
 - 10. Statute of limitations.
 - 11. Set-off.
 - 5. Plea by executor, etc.

Matter of *estoppel* must be specially pleaded as such.

In framing a special plea it is also necessary to consider whether the defendant is under terms of pleading *issuably*.

An issuable plea is a plea in chief to the merits upon which the plaintiff may take issue and go to trial on a general demurrer for some defect in substance.

A plea in abatement is not an issuable plea.

In every species of *assumpsit* all matters in confession and avoidance shall be *specially* pleaded.

The general qualities of a plea in bar are:

First. That it be adapted to the nature and form of the action, and also be conformable to the count.

Secondly. That it answer all which it assumes to answer, and no more.

Thirdly. That it deny or admit and avoid the facts; and herein of giving color and of pleas amounting to the general issue.

Fourthly. That it be single.

Fifthly. Certain.

Sixthly. Direct and positive, and not argumentative.

Seventhly. Capable of trial.

Eighthly. True; and herein of *sham* pleas.

Pleas in bar, unlike pleas in abatement, offer matter which is a conclusive answer or defense to the action upon the merits. They are divisible into pleas of *traverse* or *denial*, and pleas by way of *confession* and *avoidance*, as all pleas in bar must *deny* or *confess and avoid* the facts stated in the declaration.

Pleas in denial are either the general issue in those actions in which so general a traverse is admissible or they occur in instances in which, there being no general issue, as in covenant, etc., some specific fact is specially disputed.

The *principles* of pleading and express rules require, in general, that matter in confession and avoidance should be *specially* pleaded, and not be given in evidence under the general issue or traverse.

A special plea amounting to the general issue or general plea is bad.

A plea in confession and avoidance must give *color* to the plaintiff.

To give color is to give credit for an apparent or *prima facie* right of action.

Pleading is a statement of *facts* and not a statement of argument; it is, therefore, a rule that a plea should be direct and positive, and advance its position of fact in an absolute form, and not by way of rehearsal, reasoning, or argument.

Every plea should be so pleaded as to be *capable of trial*, and, therefore, must consist of matter of *fact*, the *existence* of which may be tried by a jury on an issue, or the *sufficiency* of which, as a defense, may be determined by the *court* upon *demurrer*, or of matter of *record* which is triable by the record itself.

Every plea should be true and capable of proof, for, as it has been quaintly said: "Truth is the goodness and virtue of pleading, as certainty is the grace and beauty of it."

Sham pleading—that is, the pleading of matter known by the party to be false, for the purpose of delay or other unworthy object—has always been considered a very culpable abuse of justice, and has often been censured and set aside with costs.

The rules which prevail in the construction and allowance of a plea in bar are: first, that it is to be construed most strongly against the defendant; secondly, that a general plea, if bad in part, is bad for the whole; thirdly, that surplusage will not, in general, vitiate.

If an allegation is *capable* of two meanings, that exposition shall be adopted which will support, not that which will destroy, the pleading.

Pleas by several defendants. —In general, when the defense is in its nature joint, *several defendants* may join in the same plea, or they may sever without committing fault of duplicity in pleading; and one defendant may plead in abatement, another in bar, and the other may demur.

A plea which is bad in part is bad in toto.

The plaintiff may, in an action in form *ex delicto*, against

several defendants, enter a *nolle prosequi* as to one of them, but in actions in form *ex contractu*, unless the defense be merely in the *personal* discharge of one of the defendants, a *nolle prosequi* cannot be entered as to one defendant without discharging the others, for the cause of action is entire and indivisible.

Pleas of set-off. — In actions upon *simple contracts* or *specialties* for the payment of *money*, the defense frequently is a cross-demand for a *debt* due from the plaintiff to the defendant. At *common law*, and independently of the statutes of set-off, a defendant is, in general, entitled to retain or claim, by way of *deduction*, all just allowances or demands accruing to him, or payments made by him, in respect of the *same* transaction or account, which forms the ground of action; but before the statutes of set-off, where there were *cross-demands unconnected with each other*, a defendant could not, in a court of law, defeat the action by establishing that the plaintiff was indebted to him, even in a larger sum, than that sought to be recovered, and relief could only be obtained in a court of equity.

Some of the principal rules upon the subject of set-off are that the debt sued for, and that sought to be set off, should be *mutual* debts, and due to each of the parties respectively in the *same right* or *character*.

The statutes speak merely of *mutual debts*, consequently the demand of each party must be in the nature of a *debt*, so that a set-off is excluded in all actions *ex delicto*, and it cannot be admitted even in actions *ex contractu* if the claim of either party be for uncertain or unliquidated *damages*.

It has been held that a debt of *inferior degree* cannot be set off against one of a *higher degree*.

The debt attempted to be set off must be *completely due* and in *arrear* at the time the action was commenced, and a legal and *subsisting* debt, not barred by the statute of limitations.

REPLICATIONS. — Before the plaintiff *replies* or *demurs* to the plea he should consider whether or not he *may* treat it as a nullity and sign judgment.

If the plea does not profess to answer the whole action, and leave a part unanswered, the plaintiff should sign judgment *pro tanto*.

If the plea properly conclude "to the country," etc., *in assumptit*, as well as in other actions, the replication may add the common *similiter* — i. e., "doth the like," etc., or, if the plea conclude with a verification, may deny the alleged matter of defense, or may confess and avoid it by applying *new matter*.

The conclusion to a special plea may be to the country, as thus: "and this the plaintiff prays may be inquired of by the country," etc., or with a verification, thus: "and this the plaintiff is ready to verify."

When the plea concludes to the country the replication consists either of the common or special *similiter*.

The common *similiter* is: "and the plaintiff doth the like."

The special *similiter* is: "and the plaintiff, and as to the said pleas of the defendant, by him first and secondly above pleaded, and whereof he hath put himself upon the country, doth the like."

The parts of a replication to a plea containing new matter are: first, the *commencement*; secondly, the *body*; and, thirdly, its *conclusion*.

The commencement in such case professes wholly to deny the effect of the defendant's plea.

The body shows the ground on which that denial is founded.

The conclusion is either to the country or to the record, if it merely deny the plea; but if the replication contains *new matter*, it should conclude with a *verification* and a prayer that judgment be awarded in the plaintiff's favor.

The body of the replication contains matter of *estoppel*, a *traverse* or *denial* of the plea, a *confession and avoidance* of it, or, in the case of an *evasive* plea, a *new assignment*.

There is no real distinction between traverses and denials; they are the same in substance.

Any pleading by which the truth of the opponent's allega-

tion is disputed is termed a pleading by way of traverse or denial.

The first object of pleading being to bring the point in dispute between the parties, at as early a stage of the cause as possible, to an *issue* or point which is *not multifarious* or *complex*, the issue must, in general, be single; but this *single point* may consist of *several facts* if they be dependent and connected.

A party may traverse and deny any *material* and issuable allegation in his opponent's pleading.

But if an allegation in the opposite pleading be altogether *immaterial*, it cannot be traversed, otherwise the object of pleading, viz., the bringing the parties to an issue upon a matter or point decisive of the merits, would be defeated.

It is also a most material rule upon this subject that a traverse should be taken on *matter of fact* — not mere matter of conclusion of *law*.

The traverse should also be on some *affirmative matter*, and not put in issue a negative allegation, nor too *large*, nor yet too *narrow*, so as to prejudice the defense.

In general, a traverse, denial, or allegation, should be so framed as to be *divisible*, and entitle the party pleading to recover *pro tanto* if he prove part of the allegation.

Replications denying a particular fact or facts are, in point of *form*, of *three* descriptions: *first*, the plaintiff protests some fact or facts, and denies the other, concluding to the country; or, *secondly*, he at once denies the particular fact intended to be put in issue, and concludes to the country; or, *thirdly*, formally traverses a particular fact, and concludes with a verification.

It is a rule that every pleading is taken to confess such traversable matter of *fact* alleged on the other side as it does not traverse.

It is a general rule that there cannot be a traverse after a traverse where the first was material and of matter necessarily alleged.

The general rule is that a *replication must confess and avoid*

or traverse the matter stated in the plea; and, in this respect, a replication resembles a plea.

New assignment is a more minute and circumstantial manner of *re-stating* the cause of action, or some part thereof, alleged in the declaration, in consequence of the defendant having, through mistake or design, omitted to answer it in his plea. It is a kind of replication in the nature of a new declaration.

The object of a new assignment is to correct an error in the plea, and to aver that the defendant has omitted to answer the whole or a part of the true ground of complaint.

New assignments are principally confined to the action of trespass, as it rarely becomes necessary to new-assign in any other form of action.

The conclusion of a new assignment must be with a verification, in order that the defendant may have an opportunity of answering it.

A new assignment, being in the nature of a new declaration, and dismissing the previous pleading from consideration, so far as respects the matter newly assigned, the defendant should plead to it precisely as to a declaration, either by denying the matter newly assigned by the plea of not guilty, etc., or by answering it by a special plea of matter of justification; and he may plead several pleas.

To the plea or pleas to the new assignment the plaintiff should *reply* precisely as to pleas to a declaration, and if the plea be such as would require a new assignment, if pleaded to a declaration, the plaintiff should again new-assign to such plea.

The conclusions of replications, in point of *form*, should either be to the *country* or *with a verification*.

It is an established rule, applicable to every part of pleading subsequent to the declaration, that when there is an affirmative on one side and a negative on the other, or *vice versa*, the conclusion should be to the country, although the affirmative and negative be not in express words, but only tantamount thereto.

It is a general rule that when *new matter* is alleged in a replication, it should conclude with an averment or verification, in order to give the defendant an opportunity of answering it.

The qualities of a replication, in a great measure, resemble those of a plea, viz.: *first*, that it must answer so much of the plea as it professes to answer, and that if bad in part it is bad for the whole; *secondly*, that it must be conformable to, and not depart from, the count; *thirdly*, that it must present matter of *estoppel*, or must *traverse* or *confess and avoid* the plea; *fourthly*, that, like a plea, it should be certain, direct, positive, and not argumentative, and also that it be triable; *fifthly*, that it must be single.

It is a settled rule that the replication must not *depart* from the allegations in the declaration in any *material* matter.

A departure in pleading is said to be when a party quits or departs from the case or defense which he has first made, and has recourse to another; it occurs when the replication or rejoinder, etc., contains matter not pursuant to the declaration or plea, etc., and which does not support and fortify it.

The only mode of taking advantage of a *departure* is by demurrer, which may be either general or special; and if the defendant or the plaintiff, instead of demurring, take issue upon the replication or the rejoinder containing a departure, and it be found against him, the court will not arrest the judgment.

If the plaintiff do not dispute and cannot avoid the *facts* stated in the plea, but contends that their legal operation is sufficient to defeat the action, he must *demur* to the plea.

The replication must not be double — that is, contain two answers to the same plea.

When a replication or a plea in bar in replevin concludes *to the country*, the defendant can only demur, or add the common *similiter*, which is, “and the defendant doth the like,” and it is material that the defendant should take care that the *similiter* be added, for otherwise he cannot move for judgment, as in case of a nonsuit.

A rejoinder is the defendant's answer to a replication,

and is, in general, governed by the same rules as those which affect pleas, with this additional quality: that it must *support*, and not *depart* from, the plea.

Sur-rejoinders, *rebutters*, and *sur-rebutters* seldom occur in pleading, and are governed by the same rules as those to which the previous pleading of the party adopting them is subject.

Issue is defined to be a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff and defendant, though in common acceptation it signifies the *entry* of the pleadings themselves.

An *issue* is either in *law*, upon a demurrer, or in *fact*, when the matter is triable by the court upon *nul tiel record*, or a jury upon pleadings concluding to the country. The term "*issue*" is proper where only one plea has been pleaded, and though it be applied to several counts and *issue* is joined upon such plea. An *issue* should, in general, be upon an *affirmative* and a *negative*, and not upon two affirmatives. It should also be upon a *single* and a *certain point*, and its principal quality is that it must be upon a *material point*.

An *informal issue* is where a *material* allegation is traversed in an *improper* or *artificial manner*.

Repleader. — When an *issue* is *immaterial* the court will award a *repleader* if it will be the means of effecting substantial justice between the parties, but not otherwise.

In *repleader* — i. e., to plead again — the parties must begin again at the first fault which occasioned the immaterial *issue*; thus, if the declaration be insufficient, and the bar and replication are also bad, the parties must begin *de novo*, but if the bar be good, and the replication ill, at the replication.

Where the plea is good in form, though not in fact, or, in other words, if it contain a defective title, or ground of defense by which it is apparent to the court by the defendant's own showing that in *any* way of putting it he can have *no merits*, and the *issue* joined thereon be found for him, there, as the rewarding of a *repleader* could not mend the

case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*.

But where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court knew not for whom to give judgment, whether for the plaintiff or defendant, then, for the more satisfactory administration of justice, they will award a repleader.

A judgment *non obstante veredicto* is always upon the *merits*, and never granted but in a very clear case; a repleader is upon the *form* and *manner* of pleading.

When matter of defense had arisen after the commencement of the suit, it could not be pleaded in bar of the action *generally*, but must, when it had arisen *before plea* or continuance, be pleaded as to the *further* maintenance of the suit, and when it had arisen after plea, and before replication, or *after issue joined*, then *puis darien continuance*.

If any matter of defense has arisen after an *issue in fact* has been joined, or after a joinder in demurrer, it may be pleaded by the defendant, as that the plaintiff has given him a release, or that the plaintiff is a bankrupt, etc. And if the defendant became bankrupt and obtained his certificate after issue joined, he should plead this defense *puis darien continuance*.

So it may be pleaded in abatement that a *feme sole* plaintiff has married, or, in an action by an administrator, that the plaintiff's letters of administration had been revoked, *puis darien continuance*, etc.

Pleas of this kind are either in abatement or in bar.

A plea *puis darien continuance* is not a departure from, but is a waiver of, the first plea, and no advantage can afterwards be taken of it, nor can even the plaintiff afterwards proceed thereon.

The courts will sometimes set aside a plea *puis darien continuance* when it is manifestly fraudulent and against the justice of the case.

DEMURRERS. — When the declaration, plea, or repli-

cation, etc., appears on the *face of it*, and without reference to *extrinsic* matter, to be defective, either in substance or form, the opposite party may, in general, *demur*.

Demurrer has been defined to be a declaration that the party demurring "will go no further," because the other has not shown sufficient matter against him that he is bound to answer.

Where the pleading is defective in *substance* it is advisable, in general, to demur, because the party succeeding thereon is entitled to costs; but where the judgment is reversed in error, no costs are recoverable.

A demurrer admits the *facts* pleaded, and merely refers the question of their *legal* sufficiency to the decision of the court.

Demurrers are either general or special; general, where no particular cause is alleged; special, when the particular imperfection is pointed out and insisted upon as the ground of demurrer; the former will suffice when the pleading is defective in *substance*, and the latter is requisite where the objection is only to the *form* of pleading.

A demurrer is either to *the whole*, or to a *part only*, of a declaration.

In point of form no precise words are necessary in a demurrer; and a plea, which is in substance a demurrer, though very informal, will be considered as such; and it is a general rule that there cannot be a demurrer to a demurrer.

A party should not demur unless he be certain that his own previous pleading is substantially correct; for it is an established rule that, upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in *substance*; for, on demurrer, the court will consider the *whole* record, and give judgment for the party who thereon appears to be entitled to it.

DEFECTS IN PLEADING are aided or cured without any actual *amendment*, viz.: first, by *pleading over*; secondly,

by *intendment* or *presumption after verdict*; and thirdly by the *statutes of jeofails*.

Pleading over is to answer the defective pleading in such a manner that an omission or informality therein is *expressly* or *impliedly* supplied, or rendered formal or intelligible.

Intendment after verdict is a doctrine founded on the *common law*, independent of any statutory enactments; the general principle upon which it depends appears to be that where there is any defect or omission in pleading, whether in *substance* or *form*, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect or omission is *cured by the verdict*.

The main rule on the subject of *intendment* is that a verdict will aid a *defective statement* of title, but will never assist a statement of a *defective title* or cause of action.

Cured by verdict is an expression signifying that the court will, *after* a verdict, presume or intend that the particular thing which appears to be defectively stated or omitted in the pleading *was duly proved* at the trial.

THE SCIENCE OF PLEADING was no doubt derived from Normandy. The use of stated forms of pleading is not to be traced among the Anglo-Saxons. Pleading was cultivated as a science in the reign of Edward I. The object of pleading is to ascertain, by the production of an issue, the subject for decision.

I. The rules which tend simply to the production are:

(a.) That after declaration the parties must, at each stage, demur or plead, either by way of traverse or by way of confession and avoidance; and as to the nature and property of pleadings in general, without reference to their being by traverse, or by confession and avoidance, the properties are:

That every pleading must be an answer to the whole of what it adversely alleged.

That every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse, but dilatory pleas and pleas by estoppel are exceptions, as also a new assignment.

(b.) That, upon a traverse, issue must be tendered.

(c.) That an issue well tendered must be accepted.

II. The rule which tends to secure the materiality of the issue is:

(a.) That all pleadings must contain matters pertinent and material; for a traverse must not be taken of an immaterial point, and a traverse must be neither too large nor too narrow.

III. The rules which tend to produce singleness or unity in the issue are:

(a.) That pleadings must not be double.

(b.) But it is allowable both to plead and to demur to the same matter by leave of the courts or a judge.

IV. The rules which tend to produce certainty or particularity in the issue are:

(a.) That the pleadings must have certainty of place

(b.) That the pleadings must have certainty of time.

(c.) That the pleadings must specify quality, quantity and value.

(d.) That the pleadings must specify the names of persons whether parties to the suit or parties of whom mention is made in the pleading.

(e.) That the pleadings must show title.

(f.) That the pleadings must show authority.

(g.) That, in general, whatever is alleged in pleadings must be alleged with *certainty*.

The rules which tend to certainty are limited and restricted by the following subordinate rules:

It is not necessary in pleading to state that which is merely matter of evidence.

It is not necessary in pleading to state that matter of which the court takes notice *ex officio*.

It is not necessary to state matter which should come more properly from the other side.

It is not necessary to allege circumstances necessarily implied.

It is not necessary to allege what the law will presume.

A general mode of pleading is allowed where great prolixity is thereby avoided.

A general mode of pleading is often sufficient where the allegation on the other side must reduce the matter to certainty.

No greater particularity is required than the nature of the thing pleaded will conveniently admit.

Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.

Less particularity is necessary in the statement of the matters of inducement or aggravation than in the main allegations.

With respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute.

V. The rules which tend to prevent obscurity and confusion in pleading are:

(a.) That the pleading must not be insensible or repugnant.

(b.) That the pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves that construction shall be adopted which is the more unfavorable to the party pleading.

(c.) That the pleadings must not be argumentative.

(d.) That the pleadings must not be hypothetical or in the alternative.

(e.) That the pleadings must not be by way of recital, but must be positive in their form.

(f.) That things are to be pleaded according to their legal effect or operation.

(g.) That the pleadings should observe the ancient and known forms of expression, as contained in approved precedents.

(h.) But formal commencements and conclusions are dispensed with.

(i.) That a pleading which is bad in part is bad altogether.

VI. The rules which tend to prevent prolixity and delay in pleading are:

(a.) That there must be no departure in pleading.

(b.) That where a plea amounts to the general issue it should be so pleaded.

(c.) That surplusage is to be avoided.

VII. The other miscellaneous rules are:

(a.) That the declaration must be conformable to the writ.

(b.) That the declaration shall have its proper commencement, and should in conclusion lay damages and allege production of suit.

(c.) That pleas must be pleaded in due order.

(d.) That pleas in abatement must give the plaintiff a better writ or declaration.

(e.) That dilatory pleas must be pleaded at a preliminary stage of the suit.

(f.) But pleadings do no longer conclude to the country, or with a verification.

(g.) And profert of a deed is dispensed with.

(h.) That all pleadings must be properly entitled.

(i.) That all pleadings ought to be true.

The order of pleadings at common law, in all actions except replevin, is as follows:

(1.) Declaration.

(2.) Plea.

(3.) Replication.

(4.) Rejoinder.

(5.) Sur-rejoinder.

(6.) Rebutter.

(7.) Sur-rebutter; after which the pleadings have no distinctive names, for beyond this stage they are very seldom found to extend.

The pleadings 1, 3, 5, and 7 emanate from the plaintiff; the remainder, from the defendant.

The pleadings in replevin are as follows:

- (1.) Plaint or declaration.
- (2.) Avowry, cognizance, or plea of *non cepit*.
- (3.) Plea in bar.
- (4.) Replication, etc., the ordinary name of each pleading being postponed by one step.

The pleadings in equity are thus arranged:

- (1.) Bill of information.
- (2.) Answer, plea, demurrer, or disclaimer.
- (3.) Replication.

The pleadings in criminal law are:

- (1.) Indictment or information.
- (2.) Plea or demurrer.
- (3.) *Similiter* or joinder.

The pleadings in ecclesiastical causes are:

- (I.) In criminal causes.
 - (a.) The articles.
- (II.) The plenary causes, not criminal.
 - (a.) The libel.
- (III.) In testamentary causes.
 - (a.) The allegation.

Every subsequent plea, in all causes and by whatever party given, is termed —

- (b.) An allegation.

CODE PLEADING.

CODE PLEADING — ANALYSIS.

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CODE PLEADING.

1. Before Code Pleading was adopted, legal rights were redressed in common law courts, and equitable rights in equity courts. Many cases involved both legal and equitable rights and remedies. But to obtain a final settlement of rights, the plaintiff had to file one suit in the common law courts and another in the equity courts; or a defendant sued in a common law court, and, having an equitable defense, had to bring a separate action in the court of equity to establish it. Such a situation created delay in the final settlement of cases, needless expense, much confusion, and frequently defeated the ends of justice.

In 1847 the Legislature of New York appointed a committee to revise and reform the rules of pleading and practice. David Dudley Field was the leading spirit of this committee, and the code of pleading as prepared by this committee has, in course of time, been substantially adopted in a large majority of the States.

2. Code Pleading made the following changes in the systems of pleading theretofore existing. It abolished the distinction between actions at law and suits in equity, and the common law and equitable forms used in pleading, and created one form of action for the enforcement or protection of private rights and the redress of private wrongs, whether legal or equitable, or both, and named this form of action a *civil action*.

Code Pleading has not altered the common law rights and equitable rights, or substantive common law and substantive equitable law, but has merely abolished the old forms of pleading such substantive rights, and substituted in their stead the *civil action*, so that in the civil action a plaintiff may unite in the same complaint or petition several causes of

action, whether they be such as were formerly denominated legal or equitable, or both. The civil action in its nature follows more closely the equity doctrines of pleading than the common law, the former being more liberal and less technical.

3. A plaintiff may unite in his civil action several causes of action, whether they involve legal rights, equitable rights, or both. But these causes of action must arise out of (1) the same transaction or transactions, connected with the same subject of action; (2) contract, express or implied; (3) injuries, with or without force, to persons or property, or either; (4), injuries to character; (5) claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; (6), claims to recover personal property, with or without damages for the withholding thereof; (7) claims against a trustee by virtue of contract, or by operation of law.

4. But the following qualifications are made to these rules of joining actions as set out above: (1), the actions joined must all belong to one of these classes; (2), they must affect all parties to the action; (3), they must not require different places of trial; and (4) they must be separately stated, i. e., each cause of action joined must be separately pleaded in full.

5. Code Pleadings require that every action be prosecuted in the name of the real party in interest, except in the case mentioned later. Every action, which is assignable under the Code may be brought by the assignee in his own name, and the test of assignability of an action is whether such an action would on the death of the assignor survive to his personal representative. But in case of the assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or defense existing at the time of or before notice of the assignment, but this rule does not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due.

6. The Code permits other than the real party in interest to sue in the following cases. An executor, an

administrator, a trustee of an express trust, or person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. By "trustee of an express trust" is meant a person with whom, or in whose name, a contract is made for the benefit of another. This term does not include trustees of implied or resulting trusts. It will be observed that the language of the Code is the trustee may sue without joining the beneficiary, so that the *cestui que trust* may or may not join with the trustee in the suit as a party.

7. Who may join as parties plaintiff. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. Those parties whose interests are united, i. e., joint, must be joined as plaintiffs or defendants; but, if the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the petition.

8. Who should be joined as parties defendant. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved therein.

When the subject is one of common or general interest to many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Persons severally liable upon the same obligation or instrument, including parties to bills of exchange and promissory notes; and persons severally liable for the same demand, may all, or any of them, be included in the same action, at the option of the plaintiff.

9. Modern legislation and the codes have made great changes in the rules as to actions by and against husband and wife. The wife may sue alone (1) when the action concerns her separate property; (2) when it is between herself and her husband; (3), when she is suing for her earn-

ings; and (4) in some Code States when she is suing for injuries to her person or character. She is allowed to sue alone in some other rare cases, but in all other suits, her husband must join with her.

10. Suits by infants may be commenced and prosecuted either by the guardian or curator of such infant, or by a next friend appointed for him in such suit.

In suits against infants a guardian *ad litem* is appointed by the court.

The codes further provide that the court may determine any controversy between the parties before it, where it can be done without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court may cause them to be brought in. The codes have here provided a remedy similar in nature to the equitable remedy of interpleader. They also provide for intervention in actions for the recovery of real or personal property by a person not a party to the action, but having an interest in the subject-matter, making application to the court to be made a party.

12. Where there is a defect of parties plaintiff or defendant, i. e., where all who should be joined as plaintiff or defendants have not been, the defendant should demur, if the defect is apparent on the face of the petition, and if not, by raising the point in the answer. Where there is a misjoinder of parties plaintiff or defendant, i. e., where same have been improperly joined, as plaintiff or defendant, the misjoinder must, in most Code States, be raised in the same manner as in the case of a defect of parties.

13. The form and sufficiency of pleadings are determined by the rules prescribed in the codes. All pleadings must be in writing and subscribed by either the party or his attorney. Pleadings under the Code are (1) the "complainant" or "petition", being the plaintiff's statement of his cause of action; (2), the demurrer of the defendant to the complaint or petition; (3), the answer of the defendant to the

complainant or petition, wherein is set forth his defenses or counterclaim; (4), the demurrer of plaintiff to the answer; (5), the reply of the plaintiff to the defendant's counterclaim; (6), demurrer of defendant to plaintiff's reply.

14. The complaint or petition must contain the title of the cause, naming the court in which the action is brought, the names of the plaintiffs and defendants, the term of court to which the action is brought, a statement of the facts constituting plaintiff's cause of action, separated into counts if there be more than one cause of action, and the prayer for relief to which plaintiff thinks himself entitled, naming amount of damages sought to be recovered, if money judgment be desired. The petition should state the facts alleged and relied on with certainty, otherwise defendant may move for an order to make more definite and certain. It should not be insensible, i. e., unintelligible, nor repugnant, i. e., inconsistent with itself, or redundant, i. e., repeat itself.

15. The defendant may demur to the complaint, but the demurrer must state explicitly the grounds for demurring. A demurrer reaches only those defects which are apparent on the face of the complaint, and is in effect a pleading addressed to the court, admitting everything alleged in the complaint, but asking the court to rule whether or not defendant must answer the complaint because of the defect in it pointed out in the demurrer as a ground of demurring. The defendant may demur for any one of the following reasons: (1), The court has no jurisdiction of the person of the defendant or subject of the action; (2), the plaintiff lacks legal capacity to sue; (3), there is another action pending between the parties for the same cause; (4), there is a defect of parties, plaintiff or defendant; (5) because several causes of action have been improperly joined; or (6) because the complaint does not state facts sufficient to constitute a cause of action.

The defendant may demur to the whole complaint or to any one of its counts.

16. If the defendant cannot demur to the complaint, he must file an "answer". The answer may contain (1) a

general denial of each and every allegation of the complaint; or (2) a specific denial of part of the complaint; (3) it may set forth new matter in excuse and avoidance of the action set forth in the complaint; (4) it may set up a counter-claim.

17. A counter-claim is a cause of action existing in favor of the defendant and against the plaintiff, which the defendant pleads to diminish, defeat, or otherwise affect plaintiff's claim. The counter-claim must be one existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action and arising out of one of the following causes of action: (1) a cause of action arising out of the contract or transaction set forth in the Complaint, as the foundation of plaintiff's claim, or connected with the subject of action; (2) in an action on contract, any other cause of action arising on contract, express or implied, and existing at the commencement of the action. The Code counter-claim includes the common law set-off and recoupment and the equitable set-off.

The defendant may set forth, by answer, as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must be separately stated and refer to the causes of action, which they are intended to answer.

18. In all but a few Code States, where the defendant in his answer sets up new matter as a defense or pleads a counter-claim, plaintiff must reply. The reply being in its nature similar to the answer, is governed by the same rules.

The defendant must demur to a reply of the plaintiff to a counter-claim or new matter set up in the answer which fails to set up facts sufficient to constitute a defense.

19. The object of pleading being to define and set forth the question at issue, the codes hold that an issue of fact arises (1) upon a material fact alleged in the complaint and controverted in the answer; (2) or upon a material allegation of new matter or counter-claim in the answer controverted in the reply; (3), there being no pleading other than a demurrer

to the reply, every material allegation of new matter in the reply is deemed controverted.

20. The codes provide that transitory or personal actions, being supposable to arise anywhere, may be begun in any jurisdiction where service may be had on the defendant. But certain actions, called local, may only be brought in certain jurisdictions. These are for the most part actions to recover real property, to partition it, or to foreclose mortgages. Such actions must be brought in the county where the land lies.

ABRIDGMENT
OF
THE LAW OF EVIDENCE

**AS STATED IN THE STANDARD WORK OF GREENLEAF ON
EVIDENCE AND TAKEN THEREFROM BY PERMISSION
OF THE OWNERS; TO WHICH IS ADDED MANY NOTES
AND ILLUSTRATIONS FROM OTHER TEXT-BOOKS
IN GENERAL USE. THE REFERENCES ARE
TO SECTIONS OF THE ORIGINAL WORK**

ANALYSIS.

- Nature and principles of evidence.**
 - Preliminary observations.**
 - Things judicially taken notice of without proof.**
 - Grounds of belief.**
 - Evidence — definition of.**
 - Direct or positive.**
 - Circumstantial.**
 - Presumptive.**
 - Presumptions of law.**
 - Conclusive.**
 - Disputable.**
 - Presumptions of fact.**
- Object of evidence, and rules governing the production of testimony.**
 - Relevancy of evidence.**
 - Rules governing production to the jury.**
 - Variance.**
 - Primary and secondary evidence.**
 - Hearsay evidence.**
 - Original evidence — often wrongfully called hearsay.**
 - Exceptions to the rule rejecting hearsay evidence.**
 - Admissions.**
 - Confessions.**
 - Evidence excluded from public policy.**
 - Number of witnesses.**
 - Admissibility of parol evidence to affect writings.**
- Means of proof, or the instruments of evidence.**
 - Witnesses and means of procuring their attendance.**
 - Competency of witnesses.**
 - In regard to parties.**
 - To persons deficient in understanding.**
 - Those insensible to the obligations of an oath**
 - Persons interested.**
 - Examination of witnesses.**
 - Direct examination.**
 - Cross-examination.**
 - Written evidence.**
 - Public document.**
 - Mode of proof.**
 - Records and judicial writings.**
 - Private writings.**

EVIDENCE.

NATURE AND PRINCIPLES OF EVIDENCE.

PRELIMINARY OBSERVATIONS.—Evidence, in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.

Proof is that which establishes a thing by competent and satisfactory evidence.

Demonstration is that high degree of evidence of which none but mathematical truth is susceptible.

Moral evidence is that which alone proves matters of act, and also includes all the evidence not obtained either from intuition or from demonstration. (Sec. 1.)

Competent evidence is that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case; as the production of a writing, where its contents are the subject of the inquiry.

Satisfactory evidence—sometimes called *sufficient evidence*—is that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt.

Cumulative evidence is evidence of the same kind to the same point.

Corroborative evidence is that which tends to strengthen and confirm. (Sec. 2.)

Things judicially taken notice of, without proof, by the courts, are whatever ought to be generally known within the limits of their jurisdiction. (Sec. 4.)

THE GROUNDS OF BELIEF in evidence are:—

First. The uniform habits and necessities of mankind lead us to consider the disposition to belief upon the evidence of extraneous testimony as a fundamental principle

of our moral nature. They constitute the general *basis* upon which all evidence may be said to rest. (Sec. 9.)

Secondly. A basis of evidence, subordinate to this paramount and original principle, rests upon our faith in human testimony, as sanctioned by experience. (Sec. 10.)

Thirdly. Another basis of evidence is the known and experienced connection subsisting between collateral facts or circumstances, satisfactorily proved, and the fact in controversy. (Sec. 11.)

Fourthly. Another basis claimed, by some writers, is the effect of coincidences in testimony, which, if collusion be excluded, cannot be accounted for upon any other hypothesis than that it is true. (Sec. 12.)

It is said that "the wise and beneficent Author of Nature intended us to be social creatures, and, as a consequence, that we should receive the greater part of our knowledge from others; hence he implanted in our nature a principle or propensity to speak the truth. This principle has a powerful operation, even in the greatest liars; for where they lie once, they speak the truth a hundred times. *Truth* is always at the door of our lips, and goes forth spontaneously if not held back. It is always uppermost, and the natural issue of the mind, and requires no art, training, inducement, or temptation, but only that we yield to a natural impulse. *Lying*, on the contrary, is doing violence to our nature, and is never practiced, even by the worst men, without some temptation."

EVIDENCE is direct or *positive*, and indirect or *circumstantial*.

Direct or positive evidence is such where the *factum probandum*, or fact to be proved, is directly attested by those who speak from their own actual and personal knowledge, the proof applying immediately to the fact to be proved, without any intervening process. It rests upon the second basis of evidence. (Sec. 13.)

Circumstantial evidence is such where the fact to be proved is *inferred* from other facts satisfactorily proved, the proof applying immediately to *collateral* facts, supposed to

have a connection, near or remote, with the fact in controversy. It rests upon the third basis of evidence.

Circumstantial evidence is of two kinds, viz.: *certain*, or that from which the conclusion necessarily follows; and *uncertain*, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by a process of reasoning.

A verdict may be well founded on circumstances alone, and these often lead to a conclusion far more satisfactory than direct evidence can produce.

Presumptive evidence is circumstantial evidence, or the evidence afforded by circumstances, with the additional *presumption* or inference, founded on the known usual connection between the facts proved and the guilt of the party implicated; hence it is a more complex and difficult operation of the mind than in circumstantial evidence, though, in truth, the operation of the mind is similar in both. Presumptive evidence is divided into *presumptions of law* and *presumptions of fact*. (Sec. 13.)

Presumptions of law consist of those rules which in certain cases either forbid or dispense with any ulterior inquiry. They are founded upon the first principles of justice, the laws of nature, or the connection usually found to exist between certain things in the experienced course of human conduct and affairs. They are of two kinds, *conclusive* and *disputable*. (Sec. 14.)

Conclusive presumptions of law — also called *imperative* or *absolute* presumptions — are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise.

Thus, a *sane* man is conclusively presumed to contemplate the natural and probable *consequences* of his own acts; therefore the intent to murder is conclusively inferred from the deliberate use of a deadly weapon. (Sec. 18.)

The *records* of a court of justice are presumed to have been

correctly made. A party to the record is presumed to have been interested in the suit.

A *bond* or other *specialty*, is presumed to have been made upon good *consideration* as long as the instrument remains unimpeached. (Sec. 19.)

Ancient deeds and *wills* more than thirty years old, unblemished by any alterations, are said to prove themselves, being presumed valid and the subscribing witness dead. (Sec. 21.)

Estoppels may be ranked in this class of presumptions. A man is said to be estopped when he had done some act which the policy of the law will not permit him to gainsay or deny. (Sec. 22.)

Recitals in deeds by the general rule bind all the parties thereto, and operate as an estoppel against them, binding both parties and privies, privies in blood, in estate, and in law. Between such parties and privies the deed, or other matter recited, need not at any time be otherwise proved, the recital of it in the subsequent deed being conclusive. (Sec. 23.)

An *infant* under the age of seven years is conclusively presumed to be incapable of committing any felony for want of discretion. A female under the age of ten years is presumed incapable of consenting to sexual intercourse.

A *married woman* acting in company with her husband, in the commission of a felony other than treason and homicide, is conclusively presumed to act under his coercion, and consequently without any guilty intent.

Where the husband and wife have cohabitated together as *such*, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife may have been guilty of infidelity. (Sec. 28.)

In the case of conclusive presumptions, the rule of law merely attaches itself to the circumstances when proved; it is not deduced from them. It is not a rule of inference from testimony, but a rule of protection, as expedient and for the general good. (Sec. 32.)

Disputable presumptions of law are such as are *liable* to be rebutted by proof to the contrary. Here, also,

the law itself, without the aid of a jury, infers the one fact from its known and experienced connection with the proved existence of the other in the *absence* of all opposing evidence. (Sec. 33.)

E. g. — As men do not generally violate the penal code, the law presumes every man *innocent*; but some men do transgress it, and, therefore, evidence is receivable to repel this presumption.

On the other hand, as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been criminally intended until the contrary appears. (Sec. 34.)

On the same principle, where a debt by *specialty* has been unclaimed, and without recognition for *twenty years*, in the absence of any explanatory evidence it is presumed to have been paid. (Sec. 39.)

Presumptions of fact differ from presumptions of law in this, that while those are reduced to fixed rules, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, without the aid of any rules of law.

Long acquiescence in any adverse claim of right is good ground on which a jury may presume that the claim had a legal commencement.

Presumptions of fact fall within the exclusive province of the jury to decide, by themselves, according to the convictions of their own understanding. (Sec. 48.)

OBJECT OF EVIDENCE, AND RULES GOVERNING THE PRODUCTION OF TESTIMONY.

RELEVANCY OF EVIDENCE. — Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence, a question for the jury.

Where the question is mixed, consisting of both law and fact, so intimately blended as not to be easily susceptible of separate decision, it is submitted to the jury, who are first

instructed by the judge in the principles and rules of law, by which they are to be governed in finding a verdict, and these instructions they are bound to follow.

Questions of interpretation, as well as of construction of written instruments, are for the court alone. (Sec. 49.)

The general rules or principles governing the production of testimony to the jury are: —

First. The evidence must *correspond with the allegations*, and be confined to the *point in issue*. (Sec. 50.)

Secondly. It is sufficient if the *substance* only of the issue is proved. (Sec. 56.)

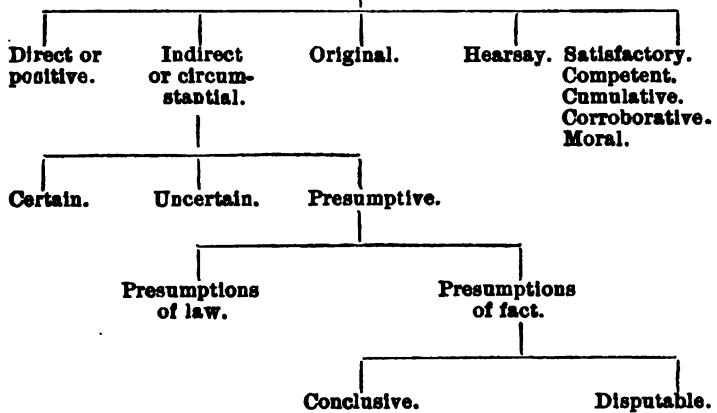
EVIDENCE

MAY BE

PRIMARY OR SECONDARY,

WRITTEN OR UNWRITTEN,

AND



Thirdly. The *burden* of proving a proposition or issue lies on the party holding the affirmative. (Sec. 74.)

Fourthly. The *best* evidence of which the case, in its nature, is susceptible *must always be produced*. (Sec. 82.)

Of the first rule in general. — *Surplusage* comprehends whatever may be stricken from the record without destroying the plaintiff's right of action. (Sec. 50.)

It is not necessary that the evidence should bear *directly* upon the issue; it is admissible if it *tends* to prove the issue or constitutes a link in the chain of proof.

Nor is it necessary that its relevancy should appear at the time when it is offered; but if it does not subsequently become connected with the issue, it is to be laid out of the case. (Sec. 51.)

This rule excludes all evidence of collateral facts, for the reason that it tends to draw away the minds of jurors from the point in issue; to excite prejudice and mislead them; moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it. (Sec. 52.)

Under this rule, also, evidence of the *general character* of the parties is not admissible in civil cases unless the nature of the action involves the general character of the party, or goes directly to affect it. In all cases where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him. (Sec. 54.)

Of the substance of the issue. — In the application of the second rule a distinction is made between allegations of matter of *substance* and allegations of matter of *essential descriptions*. The former may be substantially proved, but the latter must be proved with a degree of strictness, extending, in some cases, even to literal precision. (Sec. 56.)

In general, the allegations of *time, place, quantity, quality, and value*, when not descriptive of the identity of the subject of the action, need not be proved strictly as alleged. (Sec. 61.)

Variance is a disagreement between the allegation and

the proof in some matter in point of law essential to the charge or claim. It being necessary to prove the substance of the issue, any departure from the substance, in the evidence adduced, is fatal, constituting a variance. (Sec. 63.)

Where the matter, whether introductory or otherwise, is descriptive, it must be proved as laid, or the variance will be fatal.

In *actions upon contract*, if any part of the contract proved should vary materially from that which is stated in the pleadings, it will be fatal, for a contract is an entire thing, and indivisible.

The *gravamen* is the substantial grievance or complaint. In breaches of contract it is that certain act which the defendant engaged to do, yet has not done. (Sec. 66.)

The *gist* of an action is the cause for which it lies—the ground or foundation of a suit, without which it is not maintainable.

In almost every case the consequence of a variance between the allegation in the pleadings and the state of facts proved may now be avoided by *amendment* of the record. (Sec. 73.)

The *burden of proof*, or the third rule, has some exceptions, one of which includes those cases in which the plaintiff *grounds his right of action upon a negative allegation*, and where, of course, the establishment of this negative is an essential element in his case. (Sec. 78.)

The *best evidence*, or the fourth rule, excludes only that evidence which itself indicates the existence of more original sources of information. (Sec. 82.)

This rule naturally leads to the division of evidence into *primary* and *secondary*.

Primary evidence is that denominated the *best* evidence, or that which affords the greatest certainty of the fact in question.

Secondary evidence is all evidence falling short of this in its degree. (Sec. 84.)

Oral evidence cannot be substituted for any instrument which the law requires to be in writing. (Sec. 86.)

Oral proof cannot be substituted for the *written* evidence of any contract which the parties have put in writing. (Sec. 87.)

A writing, in the possession of the adverse party, is still primary evidence of the contract, and its absence must be accounted for by notice to the other party to produce it before secondary evidence of its contents can be received.

Oral evidence cannot be substituted for *any writing, the existence of which is disputed*, and which is *material*, either to the *issue* or to the *credit of the witnesses*, and is not merely the memorandum of some other fact. (Sec. 88.)

Where the writing does not fall within either of the three classes already described, there is no ground for its excluding oral evidence. (Sec. 90.)

HEARSAY EVIDENCE is that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person.

The term *hearsay* is used with reference to that which is written, as well as to that which is spoken. (Sec. 99.)

Original Evidence.—There are *four classes of declarations* which, though in truth original evidence, are usually treated under the head of *hearsay*, viz. :—

First. Where the fact that the declaration *was made*, and not its truth or falsity, is the point in question. (Sec. 100.)

Secondly. Expressions of bodily or mental feelings where the *existence* or *nature* of such feelings is the subject of equity. (Sec. 102.)

Thirdly. Cases of *pedigree*, including the declarations of those nearly related to the party whose pedigree is in question. (Sec. 103.)

Fourthly. All other cases where the declaration offered in evidence may be regarded as part of the *res gestæ* or surrounding circumstances. (Sec. 108.)

All these classes are involved in the principle of the last.

The general rule of law *rejects all hearsay reports of*

transactions, whether written or verbal, given by persons not produced as witnesses.

The principle of this rule is, that such evidence requires credit to be given to a statement made by a person who is not subject to the ordinary tests enjoined by law, viz.: the sanction of an oath, and want of opportunity for cross-examination. (Sec. 124.)

The surrounding circumstances, constituting parts of the *res gestæ*, or transaction, may always be shown to the jury along with the principal fact.

The exceptions to the rule of law rejecting hearsay evidence are allowed only on the ground of the absence of better evidence, and from the nature and necessity of the case. They are as follows: —

First. Those declarations relating to matters of *public* and *general* interest.

Secondly. Declarations relating to *ancient* possessions.

Thirdly. Declarations *against* interest.

Fourthly. *Dying* declarations, and some others of a miscellaneous nature. (Sec. 127.)

Fifthly. Testimony of *deceased* witnesses, given in a former action between the same parties.

On the first exception. — Evidence of common reputation is received in regard to public facts, as a claim of highway or a right of ferry, on somewhat similar ground to that on which public documents, not judicial, are admitted, viz.: the interest which all have in their truth, and the consequent probability that they are true. (Sec. 128.)

The value of general reputation, as evidence of the true state of facts, depends on its being the concurrent belief of minds unbiased, and in a situation favorable to a knowledge of the truth, and referring to a period when this foundation of evidence was not rendered turbid by agitation. (Sec. 132.)

Declarations made after the controversy has originated are excluded, even though proof is offered that the existence of the controversy was not known to the declarant. (Sec. 133.)

Where evidence of reputation is admitted in cases of pub-

lie or general interest, it is not necessary that the witness should be able to specify *from whom* he heard the declarations. (Sec. 135.)

The second exception to the rule is allowed in cases of ancient possession, and in favor of the admission of ancient documents in support of it. (Sec. 141.)

The third exception is allowed in the case of declarations and entries made by persons since deceased, and against the interest of the persons making them, at the time they were made, on the ground of the *extreme improbability of their falsehood*. (Sec. 147.)

The fourth exception is allowed in the case of dying declarations, on the general principle that they are declarations made in *extremity*, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth.

They are now only admissible in cases of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. These declarations are received solely on the ground that they were made *in extremis*; for where they constitute part of the *res gestæ*, or come within the exception of the declarations against interest, or the like, they are admissible as in other cases, irrespective of the fact that the declarant was under apprehension of death. (Sec. 156.)

The declarations of the deceased are admissible *only* to those things to which he would have been *competent to testify* if sworn in the cause. (Sec. 159.)

The *circumstances* under which the declarations were made are to be shown to the *judge*, it being his province, and not that of the jury, to determine whether they are admissible. (Sec. 160.)

If the statement of the deceased was committed to *writing* and *signed* by him at the time it was made, the writing should be produced if existing, and neither a copy nor parol evidence admitted in its place.

It has also been held that the *substance* of the declarations may be given in evidence if the witness is not able to state the precise language used. (Sec. 161.)

The fifth exception includes the testimony of *witnesses* given in a former action between the same parties, subsequently dead, absent, or disqualified. (Sec. 163.)

What the deceased witness testified may be proved by any person who will swear from his own memory, or by notes taken by any one who will swear to their accuracy. (Sec. 166.)

Admissions.—Under the head of exceptions to the rule rejecting hearsay evidence, it has been usual to treat of *admissions* and *confessions* by the party, considering them as declarations against his interest, and, therefore, probably true. (Sec. 169.)

Admission is a term usually applied to *civil transactions* and those matters of fact, in criminal cases, which do not involve criminal intent.

Confession is a term generally restricted to *acknowledgments of guilt*. (Sec. 170.)

The general doctrine is that the declarations of *party to the record*, or of one *identified in interest with him*, are, as against such party, admissible in evidence. (Sec. 171.)

In the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all. (Sec. 174.)

It is a *joint interest*, and not a mere *community of interest*, that renders such admissions receivable. (Sec. 176.)

An *apparent* joint interest is not sufficient to render the admissions of one party receivable against his companions, where the *reality* of that interest is the point in controversy. (Sec. 177.)

The law gives the admission of persons who are not parties to the record, but yet are *interested* in the *subject-matter* of the suit, the same weight as though they were parties to the record. But an admission made after other persons have acquired separate rights in the same subject-matter, cannot be received

to disparage their title, however it may affect the declarant himself. (Sec. 180.)

In some cases the admissions of *third* persons, *strangers* to the suit, are receivable, as when the issue is substantially upon the mutual rights of such persons at a particular time, in which case the practice is to let in such evidence, in general, as would be legally admissible in an action between the parties themselves. (Sec. 181.)

The admissions of a third person are also receivable in evidence against the party who has *expressly referred* another to *him* for information in regard to an uncertain or disputed matter. Whether the answer of a person thus referred to is *conclusive* against the party does not seem to have been settled. (Sec. 182.)

The *admissions of the wife* will bind the husband only where she has authority to make them. (Sec. 185.)

Admissions of *attorneys of record* bind their clients in all matters relating to the progress and trial of the cause; but they must be distinct and formal. (Sec. 186.)

Privity is a term denoting mutual or successive relationship to the same rights of property, and is distributed into classes according to the manner of this relationship, viz.: privies in *estate*, as donor and donee, lessor and lessee, and joint-tenants; privies in *blood*, as heir and ancestor, and coparceners; privies in *representation*, as executors and testator, administrators and intestate; and privies in *law*, where the law, without privity of blood, or estate, casts the land upon another, as by escheat.

The admissions of one person are evidence against another in respect of *privity* between them. The ground upon which admissions bind those in privity with the party making them is that they are identified in interest. (Sec. 189.)

Admissions by third persons, as they derive their value and legal force from the relation of the party making them to the property in question, are taken as parts of the *res gestae*, and may be *proved* by *any competent witness* who *heard* them, without calling the party by whom they were made. (Sec. 191.)

Admissions may be *implied* from *assumed character, language, and conduct.* (Sec. 195.)

Verbal admissions ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake. (Sec. 200.)

Of the effect of admissions when proved, the rule is that the *whole admission is to be taken together.* (Sec. 201.)

Admissions which have been *acted upon* by others are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced. It makes no difference whether they were made in express language, or are implied from the open and general conduct of the party. In such cases the party is estopped, on the grounds of public policy and good faith, from repudiating his own representations, as illustrated by the case of a man cohabiting with a woman, and treating her in the face of the world as his wife, to whom in fact he is not married. (Sec. 207.)

It makes *no difference*, in the operation of the rule, whether the thing admitted was *true* or *false*, it being the fact that it was acted upon that renders it conclusive. (Sec. 208.)

CONFESSION of guilt in criminal prosecutions. — This branch of evidence is divided into two classes, viz.: *direct* confessions of guilt, and *indirect* confessions or those which, in civil cases, are usually termed implied admissions. (Sec. 213.)

Here, also, as before remarked in regard to admissions, the evidence of verbal confessions of guilt is to be received with *great caution.* (Sec. 214.)

It is generally agreed that *deliberate confessions of guilt* are among the most effectual proofs in the law. (Sec. 215.)

Confessions are also divided into *judicial* confessions, or those made before the magistrate, or in court during the due course of legal proceedings; and *extra-judicial* confessions, or those made by the party elsewhere than before a magistrate or in court.

Extra-judicial confessions, uncorroborated by any other proof of the *corpus delicti*, are of themselves insufficient to convict.

The whole of what the prisoner said at the time of making the confession should be taken together. (Sec. 216.)

Before any confession can be received in evidence in a criminal case it must be shown that it was *voluntary*.

If the confession has been obtained by the influence of *hope* or *fear*, applied by a third person to the prisoner's mind, it must be excluded. (Sec. 219.)

Evidence excluded from public policy is such as the law dispenses with, because greater mischiefs would probably result from requiring or permitting its admissions than from wholly rejecting it. (Sec. 236.)

Of this class are communications between *husband and wife*, *professional* communications, *awards*, *secrets of state*, proceedings of grand and traverse *jurors*, and that which is *indecent* or offensive to public morals, or injurious to the feelings or interest of third persons. (Sec. 237.)

***Exceptions* to the rule are communications made to *clergymen and physicians*; and *grand jurors* may also be asked whether *twelve* of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact. (Sec. 247.)**

Number of witnesses, and the nature and quantity of proof required in particular cases. — *Two* witnesses are necessary to convict of high *treason*. (Sec. 257.)

Perjury is a crime sufficiently established by *one* witness, with *corroborating* circumstances. (Sec. 257.)

If the evidence adduced in proof of the crime of perjury consists of *two opposing statements* of the prisoner, and nothing more, he cannot be convicted; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances subsequently be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. (Sec. 259.)

The evidence arising from circumstances alone may be stronger than the testimony of any single witness. (Sec. 260.)

The statute of frauds passed in the reign of Charles II., the provisions of which have been enacted, generally, in the same words in nearly all the United States, universally requires all conveyance of land, or interest in lands, for more than three years, to be evidenced by *writing*. All interests in lands, of whatever nature, created by *parol* without writing, being allowed only the force and effect of estates at will, except leases not exceeding three years, for which term a parol lease is good; but if it is to commence *in futuro*, yet if the term is not to exceed three years, it is good. A parol lease for a longer period than the statute admits is void for the excess. (Sec. 262.)

By the same statute written evidence, signed by the party to be charged therewith, or by his agent, is required, in every case of contract by an executor or administrator, to answer damages out of *his own* estate; in every promise of one person to answer for the debt, default, or miscarriage of another, in every agreement made in consideration of marriage, in every agreement which is not performed within a year from the time of making it; in every contract for the sale of lands, tenements, hereditaments, or any interest in or concerning them; also in every case of contract for the sale of goods, unless the buyer shall receive part of the goods at the time of sale, or give something in earnest to bind the bargain, or in part payment. (Sec. 268.)

Devises of lands and tenements are also required to be in writing, signed by the testator, and attested by competent witnesses. (Sec. 272.)

Admissibility of parol or verbal evidence to affect that which is written. — By *written evidence* is here meant, not everything in writing, but that only containing the terms of a contract between the parties, and designed to be the respository and evidence of their final intentions. (Sec. 275.)

The rule is that parol contemporaneous evidence is

inadmissible to contradict or vary the terms of a valid written instrument. (Sec. 275.)

But written instruments may be read by the light of surrounding circumstances in order to more perfectly understand the intent and meaning of the parties, but *no other words* are to be added to it, or substituted in their stead.

The duty of the court is to ascertain, not what the party secretly intended, but what is the *meaning* of the *words* they have used; and where the language of an instrument has a settled legal construction, parol evidence is not admissible to contradict that construction. (Sec. 277.)

The terms of every written instrument are to be understood in their *plain, ordinary, and popular sense*, unless by the known usage of trade, or the like, they have acquired a peculiar sense.

The rule under consideration is applied *only* in suits between the *parties to the instrument*, as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. (See 279.)

The rule excludes *only parol evidence of the language* of the parties contradicting, varying, or adding to, that which is contained in the written instrument. (Sec. 282.)

But where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain that which is, *per se*, unintelligible, such explanation not being inconsistent with the written terms.

The rule does not restrict the court to the perusal of a single paper or instrument; for, while the controversy is between the original parties or their representatives, all their *contemporaneous writings*, relating to the same subject-matter, are admissible in evidence. (Sec. 283.)

Neither is the rule infringed by the admission of parol evidence showing that the instrument is altogether *void*, or that it *never* had any legal existence or binding force, either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject-matter. And this qualification applies to all contracts, whether under seal or not.

The want of a consideration may also be proved to show that the agreement is not binding unless it is under seal, which is generally conclusive evidence of a sufficient consideration, or is a negotiable instrument in the hands of an innocent indorsee. (Sec. 284.)

Fraud, practiced by the party seeking the remedy upon him against whom it is sought, and in that which is the subject-matter of the action or claim, is universally held fatal to his title.

Parol evidence may also be offered to show that the contract was made for the furtherance of objects *forbidden by law*, or that the writing was obtained by *felony*, or by duress, or that the party was *incapable* of binding himself, by reason of some legal impediment, such as infancy, coverture, want of reason, drunkenness, etc., or that the instrument came into the hands of the plaintiff without any absolute and final *delivery* by the obligor or party charged. (Sec. 284.)

Nor does the rule apply in cases where the original contract was verbal and entire, and a *part only* of it was reduced to *writing*.

Neither is the rule infringed by the introduction of parol evidence, *contradicting* or *explaining* the instrument in some of its *recitals of facts*, where such recitals do not, on other principles, estop the party to deny them; as, to show that the lands described in the deed as in one parish were, in fact, situated in another. So, also, parol evidence is admissible to show when a written promise, without date, was, in fact, made. (Sec. 285.)

As it is a leading rule that written instruments are to be interpreted according to their subject-matter, parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. Evidence which is calculated to *explain* the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it. (Sec. 286.)

There is *no material difference* of principle in the rules of

interpretation between *wills* and *contracts*, except what naturally arises from the different circumstances of the parties. The *object* in both cases is the same, namely, to discover the *intention*. And to do this, the court may, in either case, *put themselves in the place of the party*, and then see how the terms of the instrument affect the property or subject-matter. With this view evidence must be admissible of all the circumstances surrounding the author of the instrument; and if the court, by these means, cannot ascertain the meaning and intention of the author from the language of the instrument thus illustrated, it is a case of incurable and hopeless uncertainty, and the instrument, therefore, is so far inoperative and void. (Sec. 287.)

Evidence of known and established usage, respecting the subject to which the contract relates, also does not infringe the rule which forbids the admission of parol evidence to contradict or vary a written contract. But, though usage *may* be admissible to explain what is *doubtful*, it is not admissible to contradict what is plain. (Sec. 292.)

Neither is the rule infringed by the admission of oral evidence to prove a *new and distinct agreement* upon a *new consideration*, whether it be as a substitute for the old or in addition to or beyond it. (Sec. 303.)

Oral evidence is also admissible to show that, by a subsequent agreement, the time of performance, in the case of a simple contract, was *enlarged*; or the *place* of performance changed; or that the *damages* for non-performance were waived; or that it was founded upon an insufficient or unlawful *consideration*, or without consideration, or that the agreement itself was *waived*. (Sec. 304.)

Receipts, so far as they go to acknowledge only payment or delivery, are merely *prima facie* evidence of the fact, and not conclusive; therefore they may be contradicted by oral testimony. But in so far as they are evidence of a contract between the parties, they stand on the footing of all other contracts in writing, and cannot be contradicted or varied by parol. (Sec. 305.)

MEANS OF PROOF, OR THE INSTRUMENTS OF EVIDENCE.—WITNESSES, AND THE MEANS OF PROCURING THEIR ATTENDANCE.

The instruments of evidence are divided into two general classes, namely, *written* and *unwritten*. (Sec. 307.)

By *unwritten* or *oral evidence* is meant the testimony given by witnesses *viva voce*, either in open court or before a magistrate acting under its commission or the authority of law. (Sec. 308.)

The attendance of witnesses is procured by a summons called a writ of *subpoena*, every court having power definitely to hear and determine any suit having, by the common law, inherent power to call for all adequate proofs of the facts in controversy, and, to that end, to summon and compel the attendance of witnesses before it. The writ of *subpoena* suffices for only one sitting or term of court; the witness must be summoned anew to each term. (Sec. 309.)

Subpoena, or the ordinary summons, is a judicial writ directed to the witness, commanding him to appear at court to testify what he knows in the cause therein described, pending in such court, under a certain penalty mentioned in the writ.

Subpoena duces tecum is the ordinary *subpoena* containing a *clause* commanding the witness to bring forth with him also certain books or papers in his possession. (Sec. 309.)

If the witness is in custody, or is in the military or naval service, and, therefore, not at liberty to attend without leave of his superior officer, which he cannot obtain, he may be brought into court to testify by a writ of *habeas corpus ad testificandum*. (Sec. 312.)

By recognizance is another method by which the attendance of witnesses in criminal cases is enforced, which is the usual course upon all examinations where the party accused is committed or bound over for trial. (Sec. 313.)

The service of a *subpoena* upon a witness ought always

to be made in a *reasonable time* before trial. The time is generally fixed by statute according to the distance, but at *least* one day's notice is necessary, however inconsiderable the distance. (Sec. 314.)

The manner of service should be *personal*; otherwise the witness cannot be chargeable with contempt for non-appearance. (Sec. 315.)

Witnesses, as well as parties, are protected from arrest while going to the place of trial, while attending there for the purpose of testifying, and while returning home. (Sec. 316.)

Where the witness has been duly summoned, and his fees paid or tendered, or the payment or tender waived, if he willfully neglects to appear, he is guilty of a *contempt* of the process of court, and may be proceeded against by an *attachment* on motion. (Sec. 319.)

If the witness resides abroad out of the jurisdiction of the court, and refuses to attend, or is *sick* and *unable* to attend, his testimony can be obtained only by taking his *deposition*. (Sec. 320.)

OF THE COMPETENCY OF WITNESSES. — The common law rejects the testimony of *parties*, of persons *deficient in understanding*, of persons *insensible* to the obligations of an *oath*, and of persons whose *pecuniary interest* is directly *involved* in the matter in issue. (Sec. 327.)

First. — In regard to parties, the general rule of the common law is that a *party to the record*, in a civil suit, *cannot be a witness* either for himself or for a co-suitor in the cause.

This rule of the common law is founded, not solely in the consideration of interest, but partly, also, in the general expediency of avoiding temptations to perjury. (Sec. 329.)

But, by statutory provision, parties may now testify in most cases.

The principles which govern in the admission or exclusion of parties as witnesses in *civil cases* are, in general, applicable, with the like force, to *criminal prosecutions*, except so far as they are affected by particular legislation, or by considerations of public policy.

The record in a criminal prosecution cannot be used as evidence in a civil suit, either at law or in equity, except to prove the mere fact of the adjudication, or a judicial confession of guilt, by the party indicted. (Sec. 362.)

Where the facts are personally known by the judge, it seems now agreed that the same person cannot be *both witness and judge*; nor can a judge, on the grounds of public interest and convenience, be called to testify to what took place before him in the trial of another cause, though he may testify to foreign and collateral matters. (Sec. 364.)

It has been held in England a very objectionable proceeding on the part of an attorney to give evidence when the acting advocate in a cause, and a sufficient ground for a new trial; but in the United States no case has been found to proceed to that extent, and the fact is hardly ever known to occur. (Sec. 364.)

Secondly. — As to persons deficient in understanding being incompetent to testify; while the deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness; but if the cause be temporary, and a lucid interval should occur, or a cure be effected, the competency is restored. (Sec. 365.)

Persons deaf and dumb, though in presumption of law idiots, if proved by the party offering them as witnesses to be persons of *sufficient understanding*, may be sworn and give evidence by an interpreter, writing, or by means of signs. (Sec. 366.)

In respect to children there is no precise age within which they are absolutely excluded on the presumption that they have not sufficient understanding. At the age of fourteen every person is presumed to have common discretion, and understanding until the contrary appears; but under that age it is not so presumed, and, therefore, inquiry is made as to the degree of understanding of the child, and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify, whatever his age may be — the

examination being made by the judge, at his discretion. (Sec. 367.)

Thirdly. — Those who are insensible to the obligations of an oath, from defect of religious sentiment and belief, constitute another class of persons incompetent to testify as witnesses, as *atheists, infidels*, etc. (Sec. 368.)

An oath is an outward pledge, given by the witness, that his attestation or promise is made under an immediate sense of his responsibility to God.

As to the degree of religious faith necessary or required in a witness the rule of law is that the person is competent to testify if he believes in the being of God, and a future state of rewards and punishment—that is that divine punishment will be the certain consequence of perjury. (Sec. 369.)

Persons infamous — that is, who have been legally adjudged guilty of those heinous crimes which men generally are not found to commit unless so depraved as to be unworthy of credit for truth — are included under this general head of exclusion because of insensibility to the obligation of an oath, the basis of this rule being that such a person is morally too corrupt to be trusted to testify. (Sec. 372.)

No person is deemed infamous, in law, until he has been legally found guilty of an infamous crime; the mere verdict of the jury is not sufficient; judgment only is the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify. (Sec. 375.)

Accomplices. — *A particeps criminis*, notwithstanding the turpitude of his conduct, is a competent witness so long as he remains not convicted and sentenced for an infamous crime.

The admission of accomplices as witnesses for the government is justified by the necessity of the case, it often being otherwise impossible to bring the principals to justice. The usual course is to leave out of the indictment those who are to be called as witnesses. When already indicted, whether the accomplice shall be admitted as a witness for the government

or not is determined by the judges as in their discretion may best serve the purpose of justice. (Sec. 379.)

The *degrees of credit*, however, to be given to an accomplice is a matter exclusively within the province of the jury; and it has become the settled practice, under advice from the bench, not to convict a prisoner, in any case, of felony upon the sole and uncorroborated testimony of an accomplice. (Sec. 380.)

Fourthly. — Those interested in the results of a cause constitute another class of persons incompetent to testify on the same principle that excludes parties themselves, viz.: the temptations and danger of perjury, and the little credit generally found due to such testimony in judicial investigations. (Sec. 386.)

EXAMINATION OF WITNESSES. — This subject lies chiefly in the discretion of the judge, it being, from its very nature, susceptible of but few positive and stringent rules.

Whatever is left to the discretion of one judge, his decision is not subject to be reversed or revised by another. (Sec. 431.)

If the judge deems it essential to the discovery of truth that the witnesses should be examined *out of the hearing of each other*, he will so order it. (Sec. 432.)

When a witness has been duly sworn and his competency settled, if objected to, he is first examined by the party producing him, which is called his *direct examination*. He is afterwards examined as to the same matters by the adverse party, which is called his *cross-examination*. (Sec. 433.)

In the direct examination of a witness it is not allowed to put to him what are termed *leading questions* — that is, questions which suggest to the witness the answer desired. (Sec. 434.)

Questions are also objectionable as leading which, embodying a material fact, admit of an answer by a simple negative or affirmative. An argumentative or pregnant course of interrogation is as faulty as the like course in pleading.

In some cases leading questions are permitted, even

in a direct examination, viz. : where the witness appears to be *hostile* to the party producing him, or in the *interest* of the other party, or *unwilling* to give evidence, or where an omission in his testimony is evidently caused by *want of recollection*, which a suggestion may assist.

Indeed, when and under what circumstances a leading question may be put is a matter resting on the sound discretion of the court, and not a matter which can be assigned for error. (Sec. 435.)

Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so if the writing is present in court. (Sec. 436.)

The cases in which writings are permitted to be used for this purpose are where used only for assisting the memory of the witness where he recollects having seen the writing before, and, though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct; and where, never having seen the writing, nor recollecting anything contained in it, but knowing the writing to be genuine, his mind is so convinced that he is on that ground enabled to swear positively to the fact. The *time* when the writing thus used to restore the recollection of facts *should have been made*, is generally at the time of the fact in question, or recently afterwards. (Sec. 437.)

In general, though a witness must depose to such facts only as are within his knowledge, yet there is no rule that requires him to speak with such expression of certainty as to exclude all doubt in his mind.

Though the opinions of witnesses are, in general, not evidence, yet on certain subjects some classes of witnesses may deliver their own opinions, and on certain other subjects any competent witness may express his *opinion or belief*; thus, as of the identity of a person, or of handwriting, etc.,

and if he testifies falsely as to his belief, he may be convicted of perjury. On questions of science, skill or trade, or others of the like kind, persons of skill or *experts* may not only testify to facts, but are permitted to give their opinions in evidence.

Experts, in the strict sense of the word, are persons instructed by experience; but, more generally speaking, the term includes all men of science, or persons professionally acquainted with the science or practice in question, or conversant with the subject-matter on questions of science, skill and trade, and others of the like kind. (Sec. 440.)

The law will not permit parties to impeach the general reputation of their witnesses for truth, *after* they have testified or been produced in court, though there are some exceptions to this rule; as where the witness is not one of the party's own selection, but is one whom the law *obliges* him to call, as the subscribing witness to a deed, etc. (Sec. 442.)

But a party calling a witness is not precluded from proving the truth of any *particular fact*, by any other competent testimony in direct *contradiction* to what such witness may have testified. (Sec. 443.)

Where the witness testifying had previously stated the facts in a *different* manner, the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness, preparatory to the trial, this being necessary for his protection against the contrivance of an artful witness. (Sec. 444.)

When a witness has been examined in chief, the other party has a right to *cross-examine* him, but no right to cross-examine except as to facts and circumstances connected with the matters stated in his direct examination; and if he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such, in the subsequent progress of the cause. (Sec. 445.)

Cross-examination is one of the most efficacious tests

which the law has devised for the discovery of truth; its object being that the jury by means of it, may the better understand the character of the witness they are called upon to believe; his situation with respect to the parties, and to the subject of litigation; his interest, motives, inclination, and prejudices; means of correct and certain knowledge of the facts, etc., by this opportunity of observing his demeanor, and of determining the just weight and value of his testimony. (Sec. 446.)

Where the witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner that he can be brought to let out the truth; the most effectual method is to examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and, where such a course of interrogation is skillfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony which it is desired to overturn.

Except in cross-examination, the rule that the evidence offered must correspond with the allegations, and be confined to the point in issue, excludes all evidence of *collateral facts*.

Evidence not being to a material point, the witness cannot be punished for perjury if it were *false*. (Sec. 448.)

A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, *merely* for the purpose of *contradicting* him by other evidence, if he should deny it, thereby to discredit his testimony. (Sec. 449.)

The *privilege* of a witness in *not being compelled to answer* is his own, and not that of the party; counsel, therefore, will not be allowed to make the objection; but where the witness, after being *advised* of his privilege, chooses to answer, he is bound to answer everything relative to the transaction. (Sec. 450.)

Where it reasonably appears that the answer will have a tendency to expose the witness to a penal lia-

bility, or any kind of a punishment, or to a criminal charge, he is not bound to answer.

If the prosecution, to which he *might* be exposed, is barred by lapse of time, the privilege ceases and the witness must answer.

When a witness takes advantage of his privilege, and declines answering, no inference of the truth of the fact is permitted to be drawn from that circumstance. (Sec. 451.)

Where, by answering, the witness may subject himself to a *civil* action, or *pecuniary* loss, or charge himself with a *debt*, he is bound to answer. (Sec. 452.)

Where the answer of the witness will *not directly and certainly* show his infamy, but will *only tend* to disgrace him, he may be compelled to answer. In criminal offenses the rule is different. (Sec. 456.)

But the court must see for itself that the answer will directly show his infamy before it will excuse him from testifying to the fact.

Where the question involves the fact of a previous conviction it ought not to be asked, because there is higher and better evidence which ought to be offered. (Sec. 457.)

In these matters of privilege from answering, *greater* latitude is allowed in making inquiry in the *cross-examination*, that the jury may better understand the character of the witness whom they are asked to believe, *in order* that his evidence may not pass for more than it is worth. Inquiries, therefore, having no tendency to this end, are clearly impertinent.

Where the question goes clearly to the credit of the witness for veracity it is not easy to perceive why he should be privileged from answering, notwithstanding it may disgrace him. (Sec. 459.)

After a witness has been examined in chief his credit may be impeached in various ways besides that of exhibiting the improbabilities of a story by a cross-examination, viz.: by *disproving the facts* stated by him by the testimony of others; by general evidence affecting his *credit for*

veracity; and by proof that he has made *statements out of court contrary* to what he has testified at the trial; but this is only in matters relevant to the issue.

In impeaching the credit of a witness the examination must be confined to his *general reputation*, and not be permitted as to particular facts. The witness must be able to state what is *generally said* of the person by those among whom the person dwells, or with whom he is chiefly conversant. (Sec. 461.)

A witness cannot be cross-examined as to the contents of a letter, and asking him whether he wrote such, etc., without first showing him the letter and asking him whether he wrote it; for the contents of every written paper are to be proved by the paper itself, if in existence; and if *lost*, proof of the fact being offered, he may be cross-examined as to its contents, after which he may be contradicted by secondary evidence of its contents.

Nor can he be asked, on cross-examination, *whether he has written such a thing*, stating its particular nature or purport, the proper course being to put the writing into his hands and to ask him whether it is in his writing. (Sec. 463.)

If the memory of a witness is refreshed by a paper put into his hands, the adverse party may cross-examine the witness upon that paper, without making it his evidence in the cause.

But if the paper is shown to the witness merely to prove the handwriting, this alone does not give the opposite party a right to inspect it, or to cross-examine as to its contents. (Sec. 466.)

After a witness has been cross-examined respecting a former statement made by him, *the party who called him* has a right to *re-examine* him as to the same matter, and to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on the cross-examination, and, also, of the motive by which the witness was induced to use those expressions. (Sec. 467.)

WRITTEN EVIDENCE. — Writings are divided into two classes, viz. : *public* and *private*, the former being either judicial or not judicial, and, with respect to the means and mode of proving them, *of record* or *not of record*. (Sec. 470.)

Public documents. — It has been admitted from a very early period that the *inspection* and exemplification of the records of the King's courts is the common right of the subject.

Any person interested in the proceedings has the right to a copy of a judicial record or paper on applying for it. (Sec. 471.)

Some records partake both of a public and private character, and are treated as to the one or the other, according to the relation in which the applicant stands to them; thus, the books of a corporation are public with respect to its members, but private with respect to strangers.

If an inspection is wanted by a stranger in a case not within the rule of the common law, it can only be obtained by a bill of discovery through the aid of a court of equity. (Sec. 474.)

Inspection of the books of public officers is subject to the same restriction as in the case of corporation books. (Sec. 475.)

The motion for rule to inspect and take copies of books and writings when an action is pending, may be made at any stage of the cause, and is founded on an *affidavit*, stating the circumstances under which the inspection is claimed, and that an application therefor has been made to the proper quarter and refused. (Sec. 477.)

But *when no action is pending*, the proper course is to move for a rule to show cause why *mandamus* should not issue, commanding the officer having custody of the books to permit the applicant to inspect and take copies. (Sec. 478.)

Mode of proof of public documents. Courts take notice judicially of the political constitution, or frame of the government, of their own country, its essential and political agents or officers, and its essential, ordinary, and regular operation.

The great seal of the state, and the seals of its judicial

tribunals, require no proof other than inspection. So, also, seals of state of other nations, recognized by their own sovereign seals of foreign courts of admiralty and of notaries public. (Sec. 479.)

Public statutes also need no proof, being supposed to exist in the memories of all; but, for certainty of recollection, reference is had either to a copy from the legislative rolls or to the book printed by public authority. (Sec. 480.)

Acts of state may be proved by production of the original printed document from a press authorized by government.

Proclamations, and other acts and orders of the executive of the like character, may be proved by the production of the government gazette in which they were authorized to be printed. (Sec. 481.)

Printed copies of public documents, transmitted to Congress by the President of the United States, and printed by the printer to Congress, are evidence of these documents; and in all cases of a proof by copy, if the copy has been taken by a machine, worked by the witness who produced it, it is sufficient.

As to legislative acts in the United States, generally, the printed copies of the laws and resolves of the legislature published by its authority, are held competent evidence; and it is sufficient, *prima facie*, that the book purports to have been so printed.

The journals of the legislature, and all other *public records* and *documents*, may, from their immovable nature, be proved by examined copies; and it is a *general rule* that, whenever the thing to be proved would require no collateral proof upon its production, it is provable by a copy.

Public writings, such as *official registers*, or *books* kept by persons in *public office*, are entitled to an extraordinary degree of confidence, and are generally admissible in evidence without the ordinary and necessary tests of truth, being so recognized by law, because they are required, by law, to be kept, the entries in them being of public interest and notoriety, and

because they are made under the sanction of an oath of office or official duty

All documents of a public nature, which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated *copy*. (Sec. 483.)

When the books themselves are produced, they are received as evidence without further attestation; but they must be accompanied by proof that they come from the *proper repository*.

In regard to foreign laws the courts do not take judicial notice of them, but they must be proved as facts. (Sec. 486.)

Generally, authenticated copies of the written laws, or of other public instruments of a foreign government, are expected to be produced. (Sec. 487.)

The court *may* proceed on its own knowledge of foreign laws without the aid of other proof; but, in general, foreign laws are required to be verified by the sanction of an oath unless verified by some high authority, such as the law respects, not less than it respects the oath of an individual.

The usual mode of authenticating foreign laws and judgments is by an exemplification of a copy under the great seal of state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original; or by a certificate of an officer properly authorized by law to give the copy, which certificate must itself be also duly authenticated.

Foreign unwritten laws, customs and usages are proved by *parol evidence*. — Sometimes, however, certificates of persons in high authority are allowed without other proof. (Sec. 488.)

The reciprocal relations between the *national government* and the several *states* composing the *United States* are not foreign, but domestic; hence the courts of the United States take judicial notice of all the public laws of the respective States, and the courts of the several States take judicial notice of all

public acts of Congress; but private statutes must be proved in the ordinary way. (Sec. 490.)

A printed volume purporting on the face of it to contain the laws of a sister State, is admissible as *prima facie* evidence to prove the statute laws of that State. The seal of a State is a sufficient authentication, without the attestation of any officer or any other proof; and it will be presumed *prima facie* that the seal was affixed by the proper officer. (Sec. 491.)

To entitle a book to the character of official register it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable; it is sufficient that it be *directed by proper authority to be kept*, and that it be kept according to such directions.

Any approved public and general history is admissible to prove ancient facts of a public nature, and the general usages and customs of the country. (Sec. 497.)

RECORDS AND JUDICIAL WRITINGS. — As to the proof of records, this is done either by mere *production* of the records or by a copy.

Copies of records are: exemplifications, copies by an authorized officer, and sworn copies.

Exemplifications are copies under the seal of the court where the record remains. (Sec. 501.)

The record itself is produced only when the cause is in the same court whose record it is, or when it is the subject of proceedings in a superior court. (Sec. 502.)

Copies of Records and Judicial proceedings, under seal, are deemed of higher credit than sworn copies, as having passed under a more exact critical examination. (Sec. 503.)

The records and judicial proceedings of the courts of any State are proved or admitted in any other court, within the United States, by the attestation of the clerk and the seal of the court annexed, together with a certificate of the judge that the attestation is in due form. (Sec. 504.)

The attestation of the copy must be according to the

form used in the State from which the record comes. (Sec. 506.)

An office copy of a record is a copy authenticated by an officer intrusted for that purpose, and is admitted in evidence upon the credit of the officer, without proof that it has been actually examined. (Sec. 507.)

The proof of records by an *examined copy* is by producing a witness who has compared the copy with the original, or with what the officer of the court or any other person read as the contents of the record. (Sec. 508.)

If the record is lost and is ancient, its existence and contents may sometimes be presumed; but, after proof of loss, its contents may be proved like any other document, by any secondary evidence, where the case admits of no better. (Sec. 509.)

The judgments of inferior courts are usually proved by producing from the proper custody the book containing the proceedings, or by examined copies, if perfect. (Sec. 513.)

Depositions taken upon interrogatories, *under* a special commission, cannot be read without proof of the commission under which they were taken. (Sec. 517.)

Testaments are proved by due form of law *per testes*, upon due notice and hearing of all parties concerned. (Sec. 518.)

Examinations of prisoners in criminal cases are usually proved by the magistrate or clerk who wrote them down. (Sec. 520.)

The proof of writs, whether by production of the writ itself or by a copy, depends on its having been returned or not. After being returned it has become matter of record and is to be proved by a copy from the record. If not returned it may be proved by producing it; if it cannot be found, after diligent search, it may be proved by secondary evidence, as in other cases. (Sec. 521.)

Justice requires that every cause be once fairly and impartially tried; but having been once so tried, public tranquillity demands that all litigation of

that question, and *between those parties*, should be forever closed. (Sec. 522.)

Privity denotes mutual or successive relationship to the same rights of property. Persons standing in this relation to the litigating party, being identified with him in interest, are bound by the proceedings, and hence *all privies*, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity (Sec. 523.)

A record may also be admitted in evidence in favor of a stranger against one of the parties, as containing a *solemn admission* or judicial declaration by such party in regard to a certain fact. (Sec. 527.)

The principle upon which judgments are held conclusive upon the parties requires that the rule should apply only to that which was *directly in issue*, and not to everything which was incidentally brought into the controversy.

A record, therefore, is not held conclusive as to the truth of any allegations which were not material nor traversable; but as to things material and traversable it is conclusive and final.

The general rules upon the subject of judgments being given in evidence in civil suits seems to be, *first*, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; and, *secondly*, that the judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. (Sec. 528.)

It is only where the point in issue has been determined that the judgment is a bar. (Sec. 529.)

So, also, to constitute a judgment a complete bar it must appear to have been a *decision upon the merits*. (Sec. 530.)

As a general rule a verdict and judgment in a *criminal case* cannot be given in evidence in a civil action to establish the *facts* on which it was rendered, and a judgment in a *civil action* is inadmissible as evidence in a criminal prosecution.

But the verdict and judgment in any case are always admissible to prove the fact that the judgment was rendered or the verdict given. (Sec. 538.)

By the constitution and statutes of the United States, judgments of other States, authenticated as the statutes provide, are put upon the same footing as domestic judgments, but no execution can issue upon such judgments without a new suit in the tribunals of other States. (Sec. 548.)

Depositions are but secondary evidence, and to be admissible as evidence it is essential that they be regularly taken, under legal proceedings duly pending, and in a manner provided by law.

In regard to the admissibility of a former *judgment* in evidence, it is generally necessary that there be a perfect *mutuality* between the parties, neither being concluded unless both are alike bound; but with respect to *depositions*, though this rule is admitted in its general principle, yet it is applied with more latitude of discretion, and complete mutuality or identity of all the parties is not required. (Sec. 553.)

As to *inquisitions*.—The general rule in regard to these documents is that they are admissible in evidence, but they are not conclusive except against the parties immediately concerned and their privies. (Sec. 556.)

PRIVATE WRITINGS.—In general, all such produced in evidence must be proved to be genuine.

Solemn obligations and instruments, under the hand of the party, purporting to be evidence of title, such as deeds, bills, and notes, must be produced, and the execution of them gen-

erally proved, or their absence duly accounted for, and their loss supplied by secondary evidence. (Sec. 557.)

If the instrument is lost, evidence is required that such a paper once existed—slight evidence being sufficient—and that a *bona fide* and diligent search has been unsuccessfully made for it, after which his own affidavit is admissible to the fact of its loss.

The same rule prevails where the instrument is destroyed. (Sec. 558.)

The production of private writings, in which another person has an interest, may be had either by a bill of discovery in proper cases, or, in trials at law, by a writ of *subpoena duces tecum* directed to the person who has them in his possession.

The courts of common law may also make an order for the inspection of writings in the possession of one party to a suit in favor of the other.

Application for this should be supported by the affidavit of the party. (Sec. 559.)

When the instrument is in the hands or power of the adverse party, there are, in general, except in the cases mentioned, no other means at law of compelling him to produce it; but the practice in such cases is to give him or his attorney a regular notice to produce the original, in order to lay the foundation for the introduction of secondary evidence of the contents of the document or writing, by showing that the party has done all in his power to produce the original. (Sec. 560.)

There are three cases in which such notice to produce is not necessary: first, where the instrument to be produced and that to be proved, are *duplicate originals*; secondly, where the instrument to be proved is *itself a notice*, such as a notice to quit, or a notice of the dishonor of a bill of exchange; thirdly, where, from the *nature of an action*, the defendant has notice that the plaintiff intends to charge him with possession of the instrument as in trover for a bill of exchange.

The principle of the rule does not require notice to the adverse party to produce a paper belonging to a third person, of which he has fraudulently obtained possession, as where, after service of a *subpoena duces tecum*, the adverse party had received the paper from the witness in fraud of the *subpoena*. (Sec. 561.)

The notice *may be directed* to the party or his attorney, and may be *served on either*, and it must describe the writing demanded, so as to leave no doubt that the party was aware of the particular instrument intended to be called for. (Sec. 562.)

The regular time for calling for the production of papers is not until the party who requires them has entered upon his case, until which time the other party may refuse to produce them, and no cross-examination as to their contents, until then, is usually permitted. (Sec. 563.)

If, on the production of the instrument, it *appears to have been altered*, it is incumbent on the party offering it in evidence to explain this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it is ordinarily held bound to remove.

If the alteration is noted in the *attestation clause* as having been made *before* the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from that suspicion.

Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument; but if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of when it was done, by whom, and with what intent, as matters of fact for the jury. (Sec. 564.)

Written instruments which are *altered*, in the legal sense of that term, are *thereby made void*, and any alteration causing it to speak a language different in legal effect

from that which it originally spoke is a material alteration. (Sec. 565.)

A distinction is to be observed between the *alteration* and the *spoliation* of an instrument as to its legal consequences.

Alteration is an act done upon the instrument by which its meaning or language is changed, and if what is written upon or erased from the instrument has no tendency to produce this result, or to mislead any person, it is not an alteration. This term is usually applied to the act of the party entitled under the instrument, and imports some improper design on his part to change its effect.

Spoliation is the act of a stranger, without the participation of the party interested, and is a mere mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible, or, if it be a deed, any trace remains of the seal.

Mutilated portions may be admitted as secondary evidence of so much of the original instrument. (Sec. 566.)

If the alteration is made by the *consent of parties*, such as by filling up of blanks or the like, it is valid. (Sec. 568.)

The instrument, being produced and freed from suspicion, must be proved by the subscribing witness, if there be any, or at least by one of them.

A written instrument, not attested by a subscribing witness, is sufficiently proved to authorize its introduction by competent proof that the signature of the person whose name is under-signed is genuine.

A subscribing witness is one who was present when the instrument was executed, and who, at that time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution.

But it is not necessary that he should have actually seen the party sign, nor have been present at the very moment of signing; for if he is called in immediately afterwards, and the party acknowledges his signature to the witness, and requests him to attest it, this is sufficient. (Sec. 569.)

To the rule requiring the production of the subscribing witnesses there are several classes of *exceptions*, viz. :

First, where the instrument is *thirty years old* it is said to prove itself. (Sec. 570.)

Secondly, where the instrument is *produced by the adverse party*, pursuant to notice, the party producing it *claiming an interest* under the instrument; for, by so claiming under it, he has admitted its execution. (Sec. 571.)

Thirdly, where, from the circumstances of the witnesses themselves, the party, either from *physical* or *legal obstacles*, being *unable to adduce them*, as if the witness be dead, or cannot be found, or is out of the jurisdiction, or is a fictitious person, or insane, etc.; in all such cases the execution of the instrument may be proved by other evidence. (Sec. 572.)

Fourthly, *office bonds*, required by law, must be taken in the name of some public functionary, which documents, it is *said*, have a high character of authenticity, and need not be verified by the ordinary tests of truth applied to merely private instruments.

Fifthly, a further exception to the rule has been admitted in the case of letters received in reply to others proved to have been sent to the party. (Sec. 573.)

The degree of diligence in the search for the subscribing witness is the same which is required in the search for a lost paper, the principle being the same in both cases; it must be a strict, diligent, and honest inquiry and search, satisfactory to the court, under the circumstances. (Sec. 574.)

When secondary evidence of the execution of the instrument is thus rendered admissible, it will not be necessary to prove the *handwriting* of more than one witness. (Sec. 575.)

As to the subject of the *comparison* of hands, if the witness has the proper knowledge of the party's handwriting, he *may declare his belief* in regard to the genuineness of the writing in question. (Sec. 576.)

There are two modes of acquiring this knowledge of the handwriting of another, either of which

is universally admitted to be sufficient to enable a witness to testify as to its genuineness: first, from having *seen him write*; second, from having *seen letters* or other documents purporting to be the handwriting of the party, and having afterwards *personally communicated* with him *respecting them*, or *acted upon them* as his, the party having known and acquiesced in such acts, etc. (Sec. 577.)

This rule requiring personal knowledge on the part of the witness has been *relaxed in two cases*; *first*, where the writings are of such *antiquity* that living witnesses cannot be had, and yet are not so old as to prove themselves; here *experts* are called to compare them with other writings admitted to be genuine, or proved to have been respected and treated and acted upon as such by all parties, and to give their opinion concerning the genuineness of the instrument in question from thus comparing them; *secondly*, where *other writings* admitted to be genuine are *already in the case*; here the comparison may be made by the jury, without the aid of experts. (Sec. 578.)

Where the sources of primary evidence of a written instrument are exhausted, secondary evidence is admissible; but whether, in this species of evidence, any degrees are recognized as of binding force is not perfectly agreed, but the better opinion seems to be that, generally speaking, there are none. (Sec. 582.)

The student will not fail to observe the symmetry and beauty of this branch of the law, and will rise from the study of its principles, convinced, with Lord Erskine, that "they are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life."

THE LAW OF CONTRACTS

CONTRACTS — ANALYSIS.

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CONTRACTS.

1. A contract is an agreement between two or more parties, upon sufficient consideration, for the doing or the not doing of some particular thing.

The word contract comprises, in its full and more liberal signification, every description of agreement, obligation, or legal tie, whereby a party binds himself, or becomes bound, expressly or impliedly, to another, to pay a sum of money, or perform or omit to do a certain act.

2. The essentials of a legal contract are, the parties, the consideration, the assent of the parties, and the subject-matter of the contract.

3. Parties to a contract.

Classification of Parties. — Parties may act independently and severally, or jointly, or jointly and severally. Whenever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of the law that it is a joint obligation or right. On the other hand, contracts are joint contracts, or several contracts, or joint and several contracts according as the persons who have undertaken the obligation or possess the right are joined. Whenever two or more persons have undertaken an obligation, or had a right given to them by contract, such contract may be a joint contract, a several contract, or a joint and several contract. Joint contracts are those where the persons under the obligation or possessing the right are jointly and collectively united and identified. In a several contract the persons under the obligation or possessing the right are individually and severally liable, or possess individual and separate rights. In joint and several contracts each of the persons under the obligation or possessing the right are liable individually, or possess the right individually as well as collectively.

It is a presumption of the common law, now generally abol-

ished by statute, that wherever two or more persons are under an obligation or possess a right that it is a joint contract.

As a result of the identity of interest of joint contractors in joint contracts, all of the joint contractors must sue or be sued, and if one is released, all are released; and where a joint obligation is discharged by one of the joint contractors, he may recover from the other joint contractors the adequate proportions which they ought to pay. But one or more of several contractors may sue or be sued.

4. Parties to a contract must have capacity to contract. The general rule is that all natural persons, unless otherwise disqualified, over the age of twenty-one, have the legal capacity to contract.

5. Infants. — All persons are denominated infants by common law until they reach the age of twenty-one. Infants lack the capacity to contract, on the ground of youth, immaturity, or incapacity of mind, and are protected against their contracts, but not against their frauds or torts. However, contracts of infants are not absolute nullities, but are said to be voidable contracts, that is, the infant on attaining majority, or within a reasonable time after he becomes of age, avoid the contract if he will, so also he may after coming of age affirm a voidable contract made by him during infancy. Certain contracts of infants are, however, treated as valid and not voidable, to wit: contracts for necessities. Infants may contract for necessities, because otherwise they might suffer for the want of them. The term "necessaries" includes such food, clothing, washing, medical attendance and education, etc., as may be necessary and suitable to an infant, regard being had to his condition and station in life.

6. Lunatics and drunken persons who are unable to comprehend the contract which they make have not the contractual capacity, and many courts hold that contracts made by them, when unable to comprehend the subject-matter of the contract and its terms, may be disaffirmed; other courts hold that such contracts may be disaffirmed if at the time of contracting the other party knew of the insanity, but not if he was

ignorant of it. But an insane person's contract for necessities, like those of an infant, are valid.

7. **Contracts of Married Women.** — At common law a married woman has no capacity to contract, her personal existence being merged, for most purposes, in that of her husband. She could make no valid contract; hence her husband was not bound by the contracts she attempted to make, but he was responsible for her torts. This rule of the common law is now generally abolished, and a wife may contract with regard to her separate property, as if she were single.

8. **Corporations** may contract for any purpose within the sphere of the powers authorized in their charters. A contract not within the corporate powers is termed *ultra vires*. Corporations contract through their agents or officers, and though it was the old doctrine that the corporate seal must be affixed to all contracts to make them valid, for it was "the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole," the modern doctrine is that a corporation may contract without affixing its seal in all matters where an individual may.

9. The binding effect of a contract depends on its consideration, for every contract to be valid must have a consideration. Considerations are of two kinds — good considerations and valuable considerations. A good consideration is such as that of blood, or of natural love and affection, as where a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant; and is, therefore, founded in motives of justice. Contracts based upon good considerations, though valid between the parties, are considered as merely voluntary and are frequently set aside in favor of creditors and *bona fide* purchasers. A valuable consideration must be something to which the law attaches a value; but if it be of some value, the law will not go further and ascertain

whether its value be adequate to the promise for which it serves as a consideration.

But contracts under seal or specialties, which are regarded as contracts of a higher form than ordinary contracts, are said to need no consideration, as their seal imports a consideration.

10. Contracts are classified according as they are evidenced or created; contracts under seal or specialties; contracts of record being made and entered before a judicial tribunal; oral contracts; contracts in writing. Contracts are also classified as express and implied. The classes of contracts above named are express contracts, and implied contracts occur where by law a duty is placed upon one in favor of another. The law implies a contract in that other's favor; or where from the facts or conduct of the parties the law implies a contract. Contracts are *executed* or *executory*; executed where they have been performed; executory where they are still to be performed.

11. Every contract in its ultimate analysis is reducible to an offer and acceptance. The offer and its acceptance may be evidenced by writing, orally or even by the conduct of the parties. But the acceptance of the offer must be without reserve and embrace the identical terms of the offer,—for no contract is made where the contracting parties do not agree to the same thing; otherwise there would be no assent, or meeting of the minds. An offer unaccepted or withdrawn before being accepted, becomes no contract. Where the offer is made by letter posted in the mails, the party making the offer constitutes the mails as his agent, and when the person receiving the offer posts his letter accepting, the contract is made.

12. By reason of the Statute of Frauds some contracts may not be enforced, unless they are evidenced by some writing, expressing their terms, i. e., though the contract may exist validly, as a parol contract, it will not be enforced by the courts, unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The following classes of contracts are embraced under the fourth section of the Statute of Frauds: —

1. Actions on contracts to charge an executor or administrator upon any special promise to answer damages out of his own estate.

2. Actions on contracts to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person.

3. Actions on contracts to charge any person upon any agreement made in consideration of marriage.

4. Actions on contracts or sale of lands, tenements or hereditaments, or any interest in or concerning them.

5. Actions upon any agreement that is not to be performed within the space of one year from the making thereof.

The seventeenth section of the same statute is to the effect that no contract for the sale of goods, wares and merchandise for the price of ten pounds sterling or upwards, is valid unless some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract or their agents. However, the note or memorandum is not necessary if the buyer shall accept part of the goods so sold, and actually received the same, or give something in earnest to bind the bargain or in part payment. These sections of the Statute of Frauds have been adopted generally in the United States.

13. A contract is formed by the meeting of the minds of the contracting parties, or *aggregatio mentium*, — on the terms of the proposed contract. If the minds of the parties have not in fact met, and there was a failure to agree, or misunderstanding as to any essential feature of the contract, no contract has been made. A failure of the minds to meet may arise from mistake, fraud, misrepresentation, duress or undue influence.

14. Mistake.— Mistakes are of two kinds, mistakes of law and mistakes of fact. Every person is presumed to know the law and a contract entered into by one under a misapprehension of what the law is, will not be set aside for this reason.

A mistake of fact occurs either when some fact which really exists is unknown, or some fact which is supposed to exist really does not exist. If both of the contracting parties contracted under a mutual mistake of fact, no contract ensues. Where only one contracted under a mistake of fact it is generally necessary to show some fraud on the part of the other party, or that he knew of the mistake, before the contract will be treated as void.

15. **Fraud.**— Where one party to a contract has been induced to enter into it by any fraud, misrepresentation or artifice of the other, he is not bound by the contract. There has been no such assent of the minds of the parties as the law of contracts contemplates. This fraud, artifice or misrepresentation must concern something material to the contract, and mere expressions of opinion, puffing of wares, or even false statements made in the preliminary negotiations, do not invalidate the contract. There must be some fraudulent representation or active concealment made by one of the parties to the other, with knowledge of the deceit; or an incorrect statement made by one party recklessly, careless and unmindful of the true facts, and such fraudulent or reckless statements must have been accepted and relied on by the other party. Contracts tainted with fraud are not absolutely void,—for the party defrauded may none the less insist on their performance, as the deceiving party is estopped to set up the fraud. Such contracts are, therefore, voidable, being voidable at the election of the defrauded party.

16. **Duress** is that degree of constraint or danger, either actually inflicted or threatened and impending which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. Where a person through duress and for fear of his own life and safety, or that of his wife or child, makes a contract, such contract is voidable at the option of the party acting under duress, for the reason that there has been no free and voluntary consent to the contract, but one obtained by force or intimidation.

17. **Undue Influence.** — Parties to a contract sometimes

by reason of circumstances and conditions stand in a position where one party may take an undue advantage or influence over the other. Thus, those who are in the position of parents, guardians, trustee, lawyers, etc., may, by reason of the confidence reposed in them by their children, wards, *cestui que trust* and clients, overreach and take unfair advantage of them in contracts with them. Where persons in such positions of confidence or trust have made unfair contracts by reason of their undue influence, such contracts will be set aside, at the election of the party who has been imposed upon. For the law, recognizing the different positions of the contracting parties, holds that an unconscientious advantage was taken of the party in the dependent condition, and that there has in fact been no real meeting of the minds.

18. But contracts may be invalid for other reasons than for fraud in their making or duress, or undue influence. In such cases the contracts are held invalid to prevent a fraud being worked on one of the parties to the contract. But contracts may be invalid where no fraud has been practiced on either party, and the minds of the parties have perfectly agreed on the terms of the contract. Such contracts are invalid, because they are detrimental to the public at large and this may be because the contracts are against the law, or contrary to public policy. All contracts to do anything which is forbidden by an express statute, or for the doing of which a penalty is provided by statute, are void. So also are all contracts for the doing of anything forbidden by the common law. While it is against the policy of the law to interfere with the freedom of contract, nevertheless, certain classes of contracts are held to be void which are detrimental to public order and public morals. These are contracts which tend to prevent good government; as to bargain away a public office; to improperly influence an officer in the administration of his public duties; to assign salaries or pensions of public officers, for these officials should not be exposed to the temptations of poverty —, contracts impeding the administration of justice; as to compound a felony;

contracts contrary to good morals ; any contract made to promote sexual immorality ; any contract which restrains the freedom of marriage.

19. Contracts in restraint of trade. — Any contract whereby a man is prevented from practicing his trade or profession for all future time and in any place is void ; but a contract whereby one agrees not to follow his profession in a certain circumscribed territory for a certain period of time or even for the balance of his life, is valid, if founded upon a valuable consideration, and the circumscribed locality is not unreasonable in extent ; **wagering or betting and gambling contracts** are now generally forbidden by statute, but where they are not, courts will not lend their aid to enforce them.

20. Assignment of Contracts. — Any right under contract, either express or implied, which has not been reduced to possession, is a chose in action, being so called because it can be enforced against an adverse party only by an action at law. At common law the transfer of a chose in action was forbidden because such a transfer meant merely the assignment of a lawsuit, which was against the policy of the old law. Hence, it was the common law rule that an assignee must sue in the name of the assignor. Courts of equity disregard this rule and permit assignees to sue in their own names. Under statutes to be found in all the States, an assignee may sue in his own name in the law courts, but the assignment is not valid as to the person liable in the assigned contract, until notice has been given him, and the assignee takes subject to all defenses which might have been urged against the assignor. There are assignments of contracts which are invalid, as being against public policy, as by an officer of the army or navy of his pay, salaries of judges, right of action on a tort. Assignment of contracts may be affected by a mere delivery of the evidence of the contract, and need not be in writing unless required by statute. Where a party to a contract dies, his legal representatives succeed to all his rights and liabilities under the contract, except where the

contract called for the personal work and skill of the deceased. Such contracts having been made for the deceased's personal work, his legal representatives cannot be expected to complete the contract, nor can they insist upon completing it. These observations on assignment of contracts must not be applied to the assignment or transfer of negotiable paper which rest upon peculiar rules.

21. What a contract means is a question of law; the court, therefore, determines the construction of a contract.

The intention, or to ascertain what the parties themselves meant or understood, is the first point. Courts will construe as near to this as rules of law will permit, but cannot adopt a construction of a legal instrument which shall do violence to the rules of language or to the rules of law.

A contract which the parties intended to make, but did not make, cannot be set up in the place of one which they did make, but did not intend to make.

22. **General Rules of Construction.**—The subject-matter of the contract is to be fully considered.

A party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties.

A construction which would make the contract legal is preferred to one which would have an opposite effect.

It is a rule that the whole contract should be considered in determining the meaning of any or of all its parts.

Another rule requires that the contract should be supported rather than defeated.

A further rule requires that all instruments should be construed "*contra proferentum*"—that is, against him who gives or undertakes, or enters into, an obligation,—unless in the case of the sovereign.

23. In general, where clauses are repugnant and incompatible, the earlier prevails in deeds and other instruments *inter vivos*, if the inconsistency be not so great as to avoid the instrument for uncertainty; but in the construction of wills the

latter clause prevails, as it is presumed to be a subsequent thought and the last will of the testator.

24. The law frequently supplies by its implications, the wants of express agreements, between the parties, but it never overcomes, by its implications, the express provisions of parties.

25. If the whole contract can be construed together, so that the written words and those printed make an intelligible contract, this construction should be adopted; but if not, in general, preference should be given to the written part.

26. **Entirety of contracts.** — Whether a contract is entire or separable is often of great importance.

Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract.

If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable

So, where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire.

If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.

27. **Apportionment of contracts.** — A contract is said to be apportionable when the amount of consideration to be paid by the one party depends upon the extent of performance by the other.

When parties enter into a contract by which the amount to be performed by the one, and the consideration to be paid by the other, are made certain and fixed, such a contract cannot be apportioned.

28. **Conditional contracts.** — Whether a contract be conditional or not depends not on any formal arrangement of

the words, but on the reason and sense of the thing, as it is to be collected from the whole contract.

No precise words are requisite to constitute a condition.

29. **Presumption of law.** — There are some general ones which may be considered as affecting the construction of contracts.

It is a presumption of law that parties to a simple contract intended to bind not only themselves, but their personal representatives, and such parties may sue on the contract, although not named therein.

It is also a legal presumption that every grant carries with it whatever is essential to the use and enjoyment of the grant.

Where anything is to be done, as goods to be delivered, or the like, and no time is specified in the contract, it is then a presumption of law that the parties intended and agreed that the thing should be done in a reasonable time; but what is a reasonable time is a question of law for the court.

30. **The effect of custom or usage** is that an established custom, may add to a contract stipulations not contained in it, or may control or vary the meaning of the words.

The common law is every day adopting as rules and principles the mere usages of the community, for ancient, universal, and perfectly established custom is, in fact, law.

A custom is applicable or has a bearing on a contract when it is so far established, and so far known to the parties, that it must be supposed that their contract was made in reference to it.

For this purpose the custom must be established and not casual, uniform, and not varying, general and not personal, and known to the parties.

Custom and usage are not the same thing; custom is the thing to be proved, and usage is the evidence of the custom.

Whether a custom exists is a question of fact; but, in the proof of this fact, questions of law of two kinds may arise; first, whether the evidence is admissible; and, secondly, whether the facts stated are legally sufficient to prove a custom.

As a general rule, the knowledge of a custom must be brought home to a party who is to be affected by it.

But no custom, however universal, old or known, unless it has actually passed into law, has any force over parties against their will.

Hence, in the interpretation of contracts, it is an established rule that no custom can be admitted which the parties have seen fit expressly to exclude, for a custom can no more be set up against the clear intention of the parties than against their express agreement, and no usage can be incorporated into a contract which is inconsistent with the terms of the contract.

Where the terms of a contract are plain, usage, even under that very contract, cannot be permitted to affect materially the construction to be placed upon it; but when it is ambiguous, usage for a long time may influence the judgment of the court by showing how it was understood by the original parties to it.

31. Admissibility of extrinsic evidence in the interpretation of written contracts. — It is very common for parties to offer evidence external to the contract in aid of the interpretation of its language.

The general rule is that such evidence cannot be admitted to contradict or vary the terms of a valid written contract.

When parties, after whatever conversation or preparation, at last reduce their agreement to writing, this may be looked upon as the final consummation of their negotiation, and the exact expression of their purpose.

Where the agreement between the parties is one and entire, and only a part of this is reduced to writing, it would seem that the residue may be proved by extrinsic evidence.

If there are contemporaneous writings between the same parties so far in relation to the same subject-matter that they may be deemed part and parcel of the contract, although not referred to in it, they may be read in connection with it.

It is, nevertheless, certain that some evidence from without must be admissible in the explanation or interpretation of every contract.

As to the parties of the subject-matter of a contract, the general rule is that extrinsic evidence may, and must be, received and used to make them certain, if necessary for that purpose.

But as to the terms, conditions, and limitations of the agreement, the written contract must speak exclusively for itself.

Where the language of an instrument has a settled legal meaning its construction is not open to evidence.

32. An instrument may be shown to be void and without legal existence or efficacy, as for want of consideration, or for fraud or duress, or any incapacity of the parties, or any illegality in the agreement.

If no consideration be named, one may be proved.

33. A patent ambiguity of words is that which appears to be ambiguous upon the deed or instrument: a latent ambiguity is that which seems certain and without ambiguity, for anything that appears upon the deed or instrument, but there is some collateral matter out of the deed that breeds the ambiguity.

If a contract be intelligible, and evidence shows an uncertainty—not in the contract, but in its subject-matter or its application—other evidence which will remove this uncertainty is admissible; but if a contract is not certainly intelligible by itself, it may be said that evidence which makes it so must make a new contract, and, therefore, such evidence is not admissible; but this is subject to some qualification.

The law will not make, nor permit to be made, for parties a contract other than that which they have made for themselves.

If the contract which the parties have made is incurably uncertain, the law will not, or rather cannot, enforce it, and will not, on the pretense of enforcing it, set up a different and valid one in its stead; it will only declare such a supposed contract no contract at all.

34. The law of place treats of the *lex loci contractus*, the *lex domicilii*, the *lex loci rei sitae* and the *lex fori*.

General Principles. — Laws have no force by their own

proper vigor beyond the territory of the State by which they are made.

Foreign laws may have a qualified force, or some effect within a State, either by the comity of nations or by special agreement, as by treaty or by constitutional requirements, as in case of our own country.

It is a general principle, founded in the necessities of international intercourse, that a contract which is valid where made is to be held valid everywhere, and if void or illegal by the law of the place where made, it is void everywhere.

The rule is that personal property follows the person, and it is not in any respect to be regulated by the *situs*.

Wherever the domicile of the proprietor is, there the property is to be considered as situated.

The general rule as to the construction of contracts relating to movables is: they are to be construed according to the law of the place where they are made, or the *lex loci contractus*, and if they relate to immovables or real property, they are to be construed according to the law of the place where the property is situated, or the *lex loci rei sitae*.

All personal contracts are to be construed and applied according to the law of the place where they were made.

35. Of the place of the contract.—If the contract is made in one place, to be performed in another, generally speaking, the place of performance is the place of the contract, the most common instance of which is that of a promissory note.

But debts have no *locus* or *situs*; they accompany the creditor everywhere, and authorize a demand upon the debtor anywhere.

36. But on the trial, and in respect to all questions as to the forms or method, or conduct of process, or remedy, the law of the place of the forum is applied.

37. Performance and Discharge of a Contract.—This may be by both parties completing the contract as contemplated. It may be discharged by both parties agreeing to abandon the contract by waiver, rescission or mutual release; but

no contract can be rescinded by the act of one party, unless both can be restored to the condition they were in before the contract was made. If the contract calls for the payment of money, it is discharged by the payment of the amount called for, and where acceptance of payment is refused, it is a good defense to move a tender of the amount, but in a valid tender the whole sum due must be actually produced and proffered in the lawful currency of the State in which it is offered. Further the debtor must always remain ready and willing to pay the debt.

If the contract calls for the delivery of goods, the party to deliver the goods performs the contract by delivering the goods called for at the time and place specified. If the contract specifies no time, the law implies that it shall be performed within a reasonable time.

A contract may be broken because one party renders it impossible for the other party to perform it, or by declining to do its part; or by disclaiming any liability under the contract. In such cases the other party to put him in default should offer to do or tender performance in so far as it is possible.

COMMERCIAL PAPER.

ANALYSIS.

1. Bill of exchange.
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6. Drawee or payee.
7. Time of payment.
8. Amount of payment.
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10. Delivery.
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14. Capacity of an insane person as payee, drawee or indorsee.
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18. Good and valuable considerations.
19. Illegal considerations.
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22. Presentment of bill for acceptance, and acceptance by the drawee.
23. Negotiation and indorsement.
24. Bona fide holders.
25. Presentment, protest and notice — preliminary remarks.
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28. Protest.
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30. Checks.

COMMERCIAL PAPER.

1. A bill of exchange is a written order from one person to another for the payment of money to a third person or his order, on account of the drawer. He who makes the order is the drawer, he to whom it is addressed is the drawee, he to whom it is payable is the payee. When the drawee accepts the bill he is called the acceptor. A bill of exchange is often called a draft. Bills of exchange are of two classes — foreign and inland. Inland bills are those drawn and payable in the same jurisdiction; foreign bills are those drawn in one state or country and payable in another state or country. The chief difference between inland and foreign bills of exchange is that the latter must be protested for non-payment in order to hold the drawer and indorsers liable. Foreign bills are usually drawn in sets of three, and are sent by different methods of conveyance to avoid danger of being lost. The payment of one of the set is a payment and discharge of all.

2. A promissory note is an unconditional promise made in writing by one person to pay a certain sum of money to a certain person or his order, or bearer, at a certain time. The person promising is called the maker or payer; the person to whom the promise is made is the payee.

3. Bills and notes differ from other written contracts because of the quality of negotiability. In the assignment or transfer of other written contracts the assignee or transferee gets no better title than his assignor or transferor, but the assignee or transferee of a bill or note, if he be an innocent purchaser, (which will be later explained) gets a good title free from any equitable defenses which the maker of the note or the drawer of the bill might have urged against the payee. Bills of exchange were always by the law-merchant and common law regarded as negotiable. Some question having been raised as to the negotiability of promissory notes they were declared negotiable by the statutes of 3 and 4 Anne, chapter

9, and 7 Anne, chapter 25, and similar statutes have been enacted throughout the United States.

4. **Bills and notes must be certain in the following respects:** (1) As to the drawer or maker; (2) as to the drawee or payee; (3) as to the fact of payment; (4) as to the amount of payment; (5) have words of negotiability.

5. **As to the drawer or maker:** A bill or note having no drawer or maker would be no bill or note. There may be several drawers or makers.

6. **As to the drawee or payee:** Bills and notes may have two or more drawees or payees, and a bill may be drawn in the alternative on one of two drawees.

Bills and notes payable to a fictitious person, or to the maker's order are good when indorsed, being construed as payable to bearer.

7. The bill or note must show expressly or by implication the time of payment. When no time of payment is specified it is treated as payable on demand. Bills or notes payable in installments and providing that on failure to pay one installment the whole note becomes due, are generally treated as negotiable. But a bill or note must be certain of payment, and the fact of payment must not be conditional; so it must not be payable out of a particular fund for it must be on the general credit of the maker. But a bill directing the drawee to reimburse himself out of a particular fund is good. The time of payment must be certain to arrive. A minor's bill or note is non-negotiable because the fact of payment being obtainable with the minor is uncertain.

8. The amount to be paid must be certain and fixed in the body of the bill or note. Where the amount is named in figures on the margin of the bill or note this is treated as a mere memorandum, and if a discrepancy between the figures and the amount stated in the body exists, the latter is held to be the amount to be paid. The amount to be paid must be determined from the bill itself; it may not be ascertained by reference to other papers. But notes payable "with exchange" are negotiable. Where the notes provide for the

payment of attorney's fees and costs of collection, some courts hold that these provisions destroy negotiability; others that they do not.

A bill or note should be payable in money only, by which is meant legal tender. Commercial paper payable in what is not legal tender, is non-negotiable, but a bill or note may be made payable in the money of any commercial country, for its equivalent value in the money of any other country may be ascertained.

Commercial paper stipulating that the holder may confess judgment against the maker if he fails to pay, or stipulating that the maker waives his legal exemptions, is negotiable.

The place of payment need not be named in the bill or note; for if no place is named it is payable at the maker's place of business if he has one; otherwise at his residence.

9. Commercial paper must have words of negotiability to possess negotiable character. The usual words are "order" or "bearer," but any words which show that the maker intended the paper to pass freely by assignment will be sufficient as words of negotiability. The effect of the words of negotiability is to permit the holder to take the paper free from equitable defenses, and to hold the indorser on his contract of indorsement as a guarantor. Formerly it was necessary for the maker of commercial paper to acknowledge the receipt of consideration in the body of the paper, as by use of words "value received," or often words of like import, but except where the statute expressly requires such words to be used, this is no longer necessary.

10. Before the contract contained in a bill or note may come into life and become binding, the bill or note must be delivered by the maker. Until this has been done the contract is not completed; the maker has not made and executed the bill or note.

By delivery is meant an actual or constructive passing of the commercial paper by the maker to the payee with the intent so to do. The delivery need not be to the payee, but to some third person for him, but in such case before a valid de-

livery is effected it must be shown that the payee had knowledge of it and assented to it. Delivery being an essential part of the execution of commercial paper, it takes effect only from the date of delivery; and while it is presumed that the date named in the paper is the date of delivery, it may be shown that in fact it was delivered on another date or not at all. A bill or note which was never delivered by the maker has no validity, even if it is in the possession of an innocent holder.

Frequently a bill or note is executed and delivered with no amount of payment filled in, this being left blank. In such cases there has been a good delivery and the payee is held to be impliedly authorized to fill in the amount.

11. Since an infant may avoid his contracts, it is never certain whether a bill or note made by him will be paid, hence one of the essentials of negotiability is lacking, to-wit, certainty of payment. So it is generally held that an infant can not make a valid bill or note. If, however, the infant ratifies it on becoming of age it becomes a valid contract. The holder of a bill or note given by an infant for necessities can recover of the infant the reasonable value of the necessities.

12. A bill or note is valid even though the drawee or payee is an infant, because, though the infant may disaffirm the contract, the drawer or maker has warranted the drawee or payee's capacity. For the same reason the infant payee may make a valid indorsement and as against everybody else except the infant the subsequent holder has a good title. If the infant disaffirms the contract of indorsement, then the maker will have to pay twice; once to the holder since he has warranted the infant payee's capacity, and again to the infant.

13. An insane person, as in the case of infants, can not execute a valid bill or note, but he can during a lucid interval ratify a bill or note made when insane. The holder of a bill or note made by a lunatic for necessities may recover the reasonable value of the necessities.

14. An insane person can be a drawee or payee for

the same reasons that an infant can be; but where a person who is of sound mind when the bill or note is executed making him payee subsequently becomes insane, he cannot make a valid indorsement and his indorsee will have no recourse against the drawer or maker, since the latter only warrants the drawee or payee's capacity at the time of the execution of the paper.

15. Married women. — At the common law, no married woman could make a bill or note; but since the drawer or maker warrants the drawee or payee's capacity she could, as in the case of infants, be a payee, drawee or indorser. Under recent married women's statutes a married woman can make a valid bill or note where it concerns her separate property or business.

16. A corporation, other than a municipal corporation, can execute a bill or note. An executor, administrator or guardian can not in his official character.

One partner of a trading or mercantile partnership can make a good bill or note in the name of the firm, on the theory that he has the implied power so to do. A partner of a non-trading or non-mercantile partnership has no such implied authority, and the payee or holder of paper made by him must ascertain if he had the requisite authority.

17. Commercial paper as every other class of contract must have a legal consideration. It is also a rule of law that every contract to pay money imports a consideration, and hence the bill or note need state no consideration unless it be required by statute as in some States.

The defense of want or failure of consideration can only be raised between immediate parties to the paper. It can not be raised between the maker and indorser since to do so would destroy the negotiability of the paper; unless it can be shown that the indorsee knew when he took the paper that it lacked a consideration or that the consideration had failed.

18. Consideration is of two kinds: good and valuable. A note based upon a good consideration is open to the defense of want of consideration, unless it has been negotiated

to a *bona fide* holder for value, since it is based upon a merely moral obligation. Valuable consideration is usually money consideration, but a note given in settlement of a pre-existing debt is based upon a valuable consideration. So is a note given to the payee who forbears to sue or enforce any other legal right. So is a note given in settlement of the debt of a third person. In fact any consideration which is a valuable consideration under the general law of contracts is a valuable consideration in the law of commercial paper.

19. An illegal consideration renders the bill or note void as between the maker or drawer and the payee, but has no effect as to subsequent *bona fide* holders, unless the statute law makes all contracts founded on illegal considerations absolutely void. Partial illegality of the consideration has the same effect as total illegality. See the general law of contracts for what are, and are not, illegal considerations.

20. If a consideration is at all valuable it is sufficient. The fact that it is inadequate is immaterial.

21. A total failure of consideration is a good defense to suit upon commercial paper unless the plaintiff be a *bona fide* holder for value. A partial failure is a good defense *pro tanto*.

22. The drawee of a bill of exchange is not liable on the same unless the holder of it presents it to him on or before the day it is due and he accepts the same. The drawer and prior indorser of the bill are responsible to the holder of the bill if he thus presents it to the drawee. All bills except those made payable at a certain time or on demand, which need only be presented for payment, must be presented for acceptance. The presentation must be to the drawee or his duly authorized agent, and should be presented within business hours at the drawee's place of business, and if he be not there, then at his residence. A presentation to the drawee anywhere he may be found is good. If the bill is drawn against a firm, acceptance by one member of the firm is sufficient, but if drawn against two or more jointly then it should be accepted by all. No presentation for acceptance is necessary where the drawee is dead, where the drawee is a minor, a lunatic, or a

married woman, except as changed by the married women's enabling acts, or where the drawee is the drawer. A verbal acceptance is sufficient unless the statute law requires a written acceptance. Any words evidencing an intention to accept are sufficient; so acceptance may be implied by the drawee's conduct, as tearing the bill or retaining it, and a written acceptance on a separate sheet of paper is good as to those who have acquired the bill with knowledge of the acceptance. An agreement in writing to accept a bill which may be non-existent or has not yet been presented, is good if it clearly describes the bill.

The holder is entitled to an unconditional acceptance. A conditional acceptance is equivalent to a refusal to accept, and the holder must protest unless he has the consent of the prior holders to the conditional acceptance.

An acceptance for honor is an acceptance of the bill by a stranger after presentation to the drawee and protest to preserve the credit of the drawer. The stranger must declare before a notary that he accepts the bill for the honor of some one or more of the parties to the bill, and he should indorse the bill "Accepted supra protest for the honor of A."

The drawee by accepting admits: 1, that the drawer's signature is genuine; 2, that he has funds of the drawer in his possession adequate to pay it; 3, that the drawer has the legal capacity to draw it; 4, that the drawer's signature by agent was made with his full authority; but by accepting he does not admit the genuineness of the signature of the payee or of subsequent indorsers or the genuineness of all of the terms of the bill or note.

23. The distinction between the assignment and transfer of negotiable and non-negotiable commercial paper lies in the quality of negotiability. The transferee of negotiable paper takes it free of any equitable defenses that may be set up against the original payee; the transferee of non-negotiable paper does not.

Negotiable paper which is payable to bearer or indorsed in blank may be transferred by mere delivery and the transferee

becomes the legal owner, but the legal title of paper payable to payee or order can only be transferred by indorsement. Indorsing commercial paper creates the implied contract of indorsement, that is, the person who indorses and delivers commercial paper to the indorsee impliedly agrees that if the paper is presented to the maker for payment on the date of maturity and he refuses to pay it, he will himself pay it.

Any person who is the payee or indorsee of commercial paper and who labors under no legal disability, can make a contract of indorsement. Any person may be an indorsee. An indorsement properly should be written on the back of the bill or note, but is good if it appears anywhere on it and may even be written on a slip of paper attached to the bill or note, which attached paper is called an *allonge*.

Indorsements are of several varieties: 1, in blank; 2, in full; 3, without recourse; 4, restrictive.

Indorsement in blank occurs when the indorser writes his name merely without naming the indorsee.

Indorsement in full occurs where the indorsement names the indorsee.

Indorsement without recourse occurs where the indorser writes his name and the words "without recourse on me" or words of similar import. Here the indorser merely transfers the legal title of the paper to the indorsee, but by the additional writing expressly disclaims any intention to assume the contract of indorsement. Such indorsements are sometimes called conditional or qualified as they limit the contract of indorsement.

Restrictive indorsement occurs when the indorser destroys the further negotiability of the bill or note by adding some words to the indorsement which show that the indorsee or transferee is to collect the amount due and apply it to the benefit of the indorser. Such an indorsement destroys the further circulation of the bill or note. Common forms of such indorsements are "For collection," or "For account." Subsequent holders of paper thus indorsed cannot acquire any interest in it

themselves. Restrictive and conditional indorsements differ in this, that the former destroys the further negotiability of the paper, the latter does not.

There is also a form of indorsement called **irregular indorsements**. This occurs where a person who is not a maker or transferee but a stranger puts his name on the back of the paper and this the irregular indorser does to lend credit to the paper by thus guaranteeing its payment. Courts differ as to the legal position assumed by one who thus indorses paper. Some courts hold that if the irregular indorser's indorsement precedes the indorsement of the payee he is a joint maker of the paper. Others hold that his intention in thus indorsing was merely to guarantee the paper and hence that his position is that of a guarantor, which theory clashes with the requirement of the statute of frauds that guarantees must be in writing. Other courts by reason of this last objection hold the irregular indorser to have merely the position of an indorser.

An indorsee of paper may change a prior blank indorsement to a full indorsement, or a prior full indorsement to a blank indorsement without invalidating the paper.

Paper which has been indorsed in blank may be transferred by the transferee without further indorsement. In such a transfer no contract of indorsement is made, but the transferor warrants the following facts to the transferee, which warranties are also made by the indorser without recourse to the indorsee: 1, that the body of the bill or note is genuine; 2, that the maker of the bill or note and the acceptor of a bill have legal capacity; 3, that the transferor or indorser has legal title; 4, that the bill or note is not invalid by reason of the provisions of any statute.

24. In the assignment and transfer of ordinary choses of actions, the assignee and transferee takes the chose in action subject to any defenses which might be urged against his assignor or transferor. Herein lies the difference between the transfer of ordinary choses in action and of commercial paper. The transferee of the latter, if he be what

is termed a bona fide holder, takes it free from equitable defenses which might have been urged against his transferor.

A bona fide holder is one who acquired the paper for value, without notice of defenses, before the maturity of the paper and in the usual and ordinary course of business.

By value is meant that the holder has given something substantial either in money or property in exchange for the paper, but a nominal price paid for the paper does not make one a holder for value. Under the old rule a holder was expected to be diligent in informing himself whether there was any defenses against the paper, but the modern rule is that unless the holder has been so grossly negligent as to give rise to a presumption of bad faith he takes without notice of defenses.

The holder must have acquired the paper before maturity, or he must have acquired it from one who acquired it before maturity. This last fact makes him acquire it technically before maturity, because his transferor transferred to him whatever title he had.

By "usual and ordinary course of business" is meant that the holder must have acquired it in the ordinary course of business. For this reason a receiver, an assignee in bankruptcy or for the benefit of creditors, not taking in the ordinary course of business, are not bona fide holders.

Certain defenses are valid in suit against makers and drawers by bona fide holders. The defenses are usually termed real defenses as distinguished from personal or equitable defenses, which may be used only between immediate parties to the paper. Any reason which makes the bill or note wholly void is a real defense. The infancy, coverture, lunacy or other legal disability of maker are real defenses which he may urge against a bona fide holder. So also, that the note is wholly void by reason of its being given for an illegal consideration, or that since its execution it has been altered in a material respect, or that the holder has no title because he has to claim through a forged indorsement, or his transferor had stolen the note. In all such cases the bona fide holder can not recover of the maker. But it will be observed that the warranties which an

indorser or a mere transferor of paper makes, cover those matters which may be urged as real defenses, and hence the remedy of the bona fide holder in such case is against the prior holders.

25. Bearing in mind that the contract of indorsement is that the indorser agrees with the holder of the paper that if it is presented to the maker at maturity and payment demanded and refused and the indorser be duly notified of it, he will pay; it is necessary to inquire as to presentation for payment. And this must be distinguished from the presentation of a bill of exchange for acceptance, which has been previously described. No drawer of a bill or prior indorser of a note can be sued by the holder unless a proper presentation for payment has been made, and a proper protest for non-payment has been made and proper notice of non-payment is given. No presentation for payment is necessary to make the acceptor of a bill or the maker of a note liable, when the bill or note is payable at or after sight, for the mere fact of acceptance of the bill and the execution and delivery of the note have fixed the liability of the acceptor and maker.

26. The presentment and demand for payment should be made by the holder or his duly authorized agent. If the holder be dead, his personal representative is the proper party; if he be an infant, his guardian; if he has made an assignment or a receiver has been appointed, the assignee or the receiver; and if a firm, by one of the firm.

The presentment should be to the maker or acceptor in person. — If the maker or acceptor be dead, to his personal representative. If they cannot be found presentment should be made at their residence and place of business upon some person of the age of discretion found at these places. A presentment and demand for payment made on the maker or acceptor in person at any place where found is good. When a bill has been accepted *supra* protest, presentment and demand should be made both on the drawee and acceptor *supra* protest. If the paper is made payable at a particular place the presentment must be at that place.

The presentment and demand should be made during business hours.

The holder must present the paper on the day of maturity, — Commercial paper is made payable at a certain time after date or after sight, at sight, or on demand. If no time of payment is named it is payable on demand. But in determining the date of maturity the three days of grace must be added; thus paper payable at a certain time after date or after sight matures on three days after the given time has passed. So in case of paper payable at sight three days grace are allowed, but by common law no days of grace are allowed as to paper payable on demand.

Bills and notes payable at sight and on demand are held to mature within a reasonable time. What is a reasonable time depends greatly upon the circumstances, but so long as the paper has been in active circulation it will not be said that a reasonable time has elapsed.

27. Presentment of commercial paper by the holder is in some cases excused, for it is purely a question of diligence and if a demand is found impracticable, proper efforts for that purpose having been made, the indorser will still be held liable, due notice having been given to him by the holder.

Thus where the maker or acceptor has absconded, or is a seaman on a voyage having no residence in the State, and in every case where he has no known residence or place where the paper can be presented for payment, or if he be a resident of the State and before the paper is payable he takes up a permanent residence elsewhere, it is sufficient to make presentment at the old residence. Or, if for any reason because of war, civil disorder, conflagration, or storms, there is so general an interruption that presentment is impossible, it is excused.

Presentment is not necessary where the drawer of a bill drew it without any expectation of acceptance and payment. No presentment is necessary where a bill or note is void.

Any indorsee of commercial paper may waive so far as he is concerned, the presentment of commercial paper. The waiver

should be in writing, and may be made on a separate paper or on the bill or note itself.

28. If the presentment is made and the maker or acceptor refuse payment, the holder must do two things, first: protest the note, and second: give notice of dishonor. It is imperative that foreign bills of exchange be protested. In the absence of statute it is not necessary to protest inland bills, but most States have statutes which permit proof of notice of dishonor by protest because of its greater convenience.

A protest properly authenticated is evidence by its mere production of the presentment and demand in all foreign courts where the dishonor of the bill is required to be proved. As a notary can only properly make this authentication it is customary to have a notary make presentment. For if the holder himself demand payment, and it is refused, it will be necessary for a notary in person to make a second demand before he may protest it, because in the protest the notary speaks of his own knowledge as to the dishonor of the paper. It has been shown how the notary should make the presentment, and having made it he should make his certificate of protest. This should be done on the day of presentment, but if the notary write upon the back of the dishonored paper the fact of the dishonor, by showing the date of the presentment, the fact of demand and refusal, and the reasons given for the refusal, if any, and his charge for protest, this will be sufficient and will permit him to make the formal certificate at a later day.

The certificate of protest must show: —

1. Date of presentment, including a statement that demand was made at the place of payment and on the day of maturity;
2. That payment was demanded and refused;
3. Of whom the demand was made. Where the notary could not find the acceptor or maker, it must show that he used due diligence;
4. The names of the parties to the bill or note;
5. The protest must be executed under the hand and seal of the notary.

29. **Notice of dishonor** must be given to all persons secondarily liable on the paper. It must be given by some party to the paper, or his duly authorized agent. The holder of paper may notify all the prior holders and maker or drawer, or he may simply notify his immediate indorser, in which event this indorser should for his own protection notify the prior holders and maker or drawer. This notice should be given by the holder personally as to all prior parties who live at the place of protest and payment; as to those who do not, a notice by mail is sufficient. The holder has until the expiration of the day succeeding dishonor in which to give the notice. In giving personal notice of the dishonor, it is sufficient to do so verbally so long as the fact of dishonor is communicated. The written notice must be more explicit, to wit, it must identify the paper and state the fact of presentment and dishonor, and protest had been waived, and that the holder would look for reimbursement to the party notified.

30. **Checks are a form of commercial paper** in nature similar to bills of exchange, but differing in the following manner: —

1. Bills are intended for negotiation and circulation; checks are not.

2. Checks are always drawn upon a bank or banker, and have no days of grace; and are presumed to be drawn upon a deposit which the drawer of a check has with his banker.

3. The drawer of a bill is released in case it is not presented for payment on the day of maturity, etc. The drawer of a check is not released though the holder fail to present it to the bank during the time allowed by law, except to the extent to which he has been damaged.

4. The negligent drawing of a note by the maker so that it can be easily altered does not render him liable for the amount of the note as raised.

A corporation, if not expressly granted the power to issue negotiable paper, has it impliedly where it has the power to incur an indebtedness. But municipal corporations, even though they have the power to borrow money, have no im-

plied power to give a negotiable instrument. To do so the power must be expressly granted. Where a municipal corporation has the power to give negotiable paper for certain purposes, by inference it is forbidden to do so for other purposes. If it does, then as between the corporation and payee, the former can plead *ultra vires* because the payee takes with notice; but the corporation cannot do so when sued by a *bona fide* holder, who having seen that the charter permitted the municipal corporation to issue negotiable paper for some purpose, can rightfully presume that this particular note was issued for one of the proper cases, unless the charter further said that paper issued.

SALES.

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SALES.

(Based on Sale of Goods Act 1893, 56 and 57 Victoria,
Chapter 71.)

PART I.

FORMATION OF THE CONTRACT.

CONTRACT OF SALE.

1. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

FORMALITIES OF THE CONTRACT.

3. A contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

4. (1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf (17th Section of the Statute of Frauds).

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

SUBJECT-MATTER OF CONTRACT.

5. (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, which are called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. When there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

THE PRICE.

8. (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

CONDITIONS AND WARRANTIES.

9. (1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *prima facie* calendar month.

(3) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, de-

penda in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract:

(5) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

10. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be free from any charge or incumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made.

11. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

12. There is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: —

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he

be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

SALE BY SAMPLE.

18. (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(a) There is an implied condition that the bulk shall correspond with the sample in quality:

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER.

14. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

15. (1) Where there is a contract for the sale of specific

or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

16. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract for the sale of goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer: —

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods on the expiration of such time, and, if no time has been fixed on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5. (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

17. (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

18. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the

buyer, the goods are at the buyer's risk whether delivery has been made or not.

TRANSFER OF TITLE.

19. Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

20. Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

21. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

22. (1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agency acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

PART III.

PERFORMANCE OF THE CONTRACT.

23. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

24. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf.

25. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

26. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

27. Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.

28. (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

29. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

30. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

31. (1) The unpaid seller of goods, as such, has by implication of law —

(a) A lien on the goods or right to retain them for the price while he is in possession of them ;

(b) In case of the insolvency of the buyer, a right of stop-

ping the goods in transitu after he has parted with the possession of them.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

UNPAID SELLER'S LIEN.

32. (1) The unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the time of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

33. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

34. (1) The unpaid seller of goods loses his lien or right of retention thereon —

(a) When he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

STOPPAGE IN TRANSITU.

35. When the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the

right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

36. (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

37. (1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodian in possession

of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller.

38. The unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

REMEDIES OF THE SELLER.

39. (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

40. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly

and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

REMEDIES OF THE BUYER.

41. (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

42. (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) Set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) Maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

AGENCY.

ANALYSIS.

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AGENCY.

1. An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.

2. Agents are universal when they represent their principals in business of every kind; general, when they represent their principals as to all matters of a certain kind, or in a certain place; special, when they represent their principals only as to a special matter.

3. Any person who is competent to transact the business itself is competent to appoint another as agent to transact it for him. An insane person cannot, therefore, be a principal, but no executed contract between an insane principal and one ignorant of the other's insanity will be set aside, if the contract will be a fair one and the parties can be restored to their original positions. An infant cannot be a principal; a married woman as to her separate estate may be. A partnership may be a principal. A corporation, being an artificial being, only able to act through agents, must, of necessity, be a principal.

4. Since an agent acts, not in his own right, but in the right of his principal, any person may be an agent, except imbeciles and children of tender years. A married woman may be her husband's agent and under modern law the agent of third persons.

5. An agent becomes such by some appointment of his principal. This appointment may be made and evidenced in numerous ways. But the intention of the principal to make him agent must exist in fact or be assumed by the law in those cases where the agency is created by estoppel. Authority may be conferred on the agent in writing or by parol; but no agent can be authorized to execute a deed under seal, except his authority be conferred by an instrument under seal.

6. Where one has been held out to third persons as the agent

of another, the one so holding him out will be estopped to deny that such person is his agent to persons who have dealt with him in the belief that he was in fact an agent. The law in such cases implies the agent's authority.

7. An agent is presumed to be chosen and appointed by his principal because of his trust and confidence in the agent. Hence, the general rule is that an agent can not delegate the duties of the agency to others. *Delegatus non potest delegare*. Such is the rule as to duties requiring discretion, skill and confidence, but an agent may delegate to others purely ministerial and mechanical duties.

8. An agent possesses only that authority which the principal has conferred upon him, either expressly or by implication, as where he has held him out to third persons as possessing such authority. Acts of the agent in excess of this actual or apparent authority, do not bind the principal. Third persons dealing with the agent must ascertain the agent's authority, and cannot rely on the agent's own statement of his authority. But every agent has authority to do all things usual and necessary to carry into effect the purpose of his agency.

9. In the execution of his authority an agent must act in the name of and in behalf of his principal. So a deed executed by agency must purport to be made by the principal. So in the execution of negotiable paper, it must appear that the principal is the maker of the paper. Likewise in the execution of other contracts it must be apparent that it is the principal acting merely through an agent. Whether an agent has properly executed his contract depends upon the test what was the intention of the parties as manifested in the contract. If it is clear that the principal was to be bound, then the agent has properly exercised his authority. It is not sufficient that the agent describes himself as agent, for this may be merely *descriptio personae*, and in such case the agent binds himself and not the principal.

10. Agents must be faithful, obedient and careful in handling their principal's business, and are liable to

him for any misconduct or neglect. An agent cannot put himself into a position which would antagonize his principal's interests. He may not use the agency to advance his own interests, and all profits arising out of the agency belong to the principal. The agent may only receive such compensation as agreed between him and the principal. He must follow his principal's instructions, unless some unforeseen necessity or emergency occurs which would justify a departure from them to protect the principal's interests, and he must bring to the work of the agency reasonable skill and diligence. If, however, the agency be a purely voluntary and gratuitous one, the measure of duty owed by the agent is not so great as where he is rewarded for his services. It is always an agent's duty to render an account of his services as agent.

11. The principal owes the duty to the agent to pay him a compensation for his services, unless the agency be a purely gratuitous one. Where by the terms of the agency the compensation is fixed, the agent is entitled, upon performance, to such compensation. Where no compensation has been agreed upon, if the circumstances show not merely an intention to pay, but an agreement on the part of the principal to pay a compensation, the law will imply a promise on the part of the principal to pay a reasonable compensation. The agent is entitled to compensation not only where he has fully performed the work of the agency, but if he has been discharged by the principal wrongfully he may recover his compensation. He may in such case treat the contract as rescinded and sue for the reasonable value of his services and probable damages, or he may wait until the actual termination of the contract and sue for his actual damages. If the contract of agency has no time limit fixed, the principal may discharge the agent at will and the latter can only sue for the services rendered up to the time of his discharge. A principal may always discharge an agent who has by misconduct or negligence proven unfaithful or inefficient.

12. An agent is liable to third persons for any damage they suffer, where he attempts to contract with them on

behalf of a principal from whom he has received no authority to make such a contract. So an agent is liable for any tort committed in the course of the agency on the rights of third persons and the fact that he was acting as an agent under orders of the principal is no excuse. Frequently, an agent, though acting for a principal, uses inapt words and binds merely himself.

13. The principal is liable to third persons for all the lawful acts and contracts of his agent, acting within his actual or apparent authority. Third persons dealing with agents must at their peril ascertain the scope of the agent's authority. However, if the principal has held the agent out as possessed with certain powers and clothed him with apparent authority to act for him, he will be estopped from showing that in fact the agent had no such authority, unless he can show that the third person knew he did not. The principal cannot set up secret instructions and limitations on the agent's powers to defeat his acts and contracts made within his apparent authority, unless the third person knew of such instructions and limitations. If, however, a third person with a full knowledge of the facts, elects to hold the agent and not the principal, he cannot afterwards sue the latter.

14. Frequently an agent does not disclose to third persons that he is acting as an agent. In such cases if the third person later discovers that the agent was acting for an undisclosed principal, he may elect to hold the principal. Notice given by a third person to an agent during the continuance of the agency as to matters in which the agent has authority to act, is notice to the principal.

15. A principal is liable to third persons for torts committed by the agent, which he has expressly directed or which were done by the agent in the course of his employment.

16. An agent has no right of action against third persons on contracts made in behalf of the principal, — for no privity of contract exists between the agent and the third person. If, however, the agent, though intending to act

as such, has failed by use of apt words to make the contract for his principal, and he is himself the contracting party, he may sue on the contract. There is this further exception to the general rule. If the agent has "any beneficial interest in the performance of the contract, as for commission, etc., or a special property or interest in the subject-matter of the agreement, he may support an action in his own name on the contract." Where the agent acts for an undisclosed principal and the fact of the agency is unknown to the third person, the agent may sue on the contract.

17. A third party is liable to the principal for all contracts made with his agent, — if the agency be disclosed; if the agency be not disclosed, he is liable to the principal, but may urge in defense any equities which may exist between him and the agent.

18. Frequently, one who is no agent assumes to act for another, or being in fact an agent assumes to act for his principal in a matter without the scope of the agency. Such acts being done without authority do not bind the purported principal. But if the purported principal adopt, ratify, or sanction such unauthorized acts, he makes these acts his own, and constitutes the person doing them his agent. This is called ratification. A person may ratify any acts done for him which he might have legally done himself. A person cannot, therefore, ratify void, fraudulent or criminal acts, but he may ratify torts as well as contracts. A principal may, however, ratify only such unauthorized acts as were ostensibly done in his behalf by the unauthorized agent, and he will not be held to have ratified the acts, unless he acted with a full knowledge of the facts. The ratification may be express, as by expressly sanctioning the unauthorized act, or implied, as by adopting or profiting by the unauthorized act. When the purported principal learns of the unauthorized act, it is his duty to disavow it within a reasonable time; if he fails to do so and third persons are misled or injured thereby, he will be held to have ratified the act.

19. An agency will terminate in accordance with the

agreement creating it, if the agreement named its time of duration. Where no term of duration was fixed in the contract, the agency may be terminated at the will of either the agent or the principal, unless it be an agency coupled with an interest. An agency coupled with an interest exists where the agent has an interest or property right in the subject-matter of the agency. Such an agency is not revocable at the will of the principal. Where an agency is revoked the principal should notify third persons who have had dealings with the agent. Otherwise they are entitled to act on the presumption that it still continues. The death of either the agent or the principal terminates the agency, except that the principal's death will not end an agency coupled with an interest.

PARTNERSHIP.

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PARTNERSHIP.

1. A partnership is an agreement between two or more persons, for joining together their money, goods, labor and skill, or either or all of them, and of dividing the profits and losses arising therefrom, proportionally or otherwise between them.

2. A partnership differs from a corporation in that the latter is a legal entity recognized in the law as separate and distinct from the various shareholders composing the corporation, while a partnership is not a legal entity and the law regards it merely as an association of two or more individuals. A corporation is not affected by the death of one of its stockholders. A partnership ends on the death of a partner, for the partnership being an association of two or more persons, such association necessarily terminates on the death of one of them. Corporations are created by law, partnerships by private agreement.

3. A partnership must be distinguished from mere common ownership or joint tenancy, as in the case of part ownership of a ship, such common ownership or joint tenancy may not arise from any agreement between the common or joint owners, and there may be no agreement to divide profits and losses.

4. A partnership exists as the result of an agreement, express or implied, between the partners to join together in the common enterprise. A partnership presupposes a contract express or implied creating it.

5. Partnerships are classified as universal, general and limited or special.

6. A universal partnership occurs where all the partners bring into the firm all of their property and services for their common benefit.

7. A general partnership occurs where the firm is engaged in any one or more particular kinds of business.

8. A special partnership occurs where the firm is formed for a single transaction or for any limited business.

9. Since a partnership is a contractual relation, only persons *sui juris* and capable of contracting can be partners. However, as shown under the head of contracts, a contract of partnership made by an infant is not void, but voidable only at his election, while the contract of partnership of an insane person is voidable if the other partners knew of his insanity. Married women, under modern statutes removing the disabilities of coverture, may be partners.

10. Partners are classified as ostensible, dormant or nominal.

An ostensible partner is one known to the world as a member of the firm.

A dormant partner is a member of the firm whose membership is not made known to the public.

A nominal partner is one who though in fact no member of the firm is represented to the public as being one.

A partnership, like an individual, may undertake any kind of business, but partnerships created for purposes which are illegal or which contravene public policy are void.

12. A contract of partnership may be created like another contract, by a writing, verbally, or by conduct implying and presupposing an agreement of partnership. Where the formation of the partnership is evidenced by partnership articles or the parties have verbally agreed in clear and apt words to form a partnership, no doubt as to the existence of the partnership can arise. But frequently the relations of the various individuals are so poorly defined that it is questionable whether or not a partnership has been formed, and in other cases, parties acting together without intending to become partners have so united themselves that the law will treat them as partners. In all such cases, the question whether or not a partnership exists is determined by inquiring into the intention of the parties. By this is meant not whether they intended to form a partnership or not, but

whether they contemplated such acts and relations, the legal effect of which is to create a partnership relation. The purpose of a partnership being a union of property or services and a division of the profits or a sharing of the losses arising therefrom, one chief test of whether or not a partnership exists is whether there is an agreement to share profits and losses. But this test is not an absolute and conclusive one. Cases arise where profits and losses are shared and no partnership exists. Not only must there be a participation in the profits by the various parties, but they must bear to each other mutually the relation of principal and agent in the partnership business.

13. Persons who have entered into partnership with one another are called, collectively, a firm. A firm name, and all acts done and instruments executed in the firm name are binding on the partners. The firm owns all the property originally brought into the partnership by its members and all that has been since acquired in its business. No one partner owns any particular article of partnership property, but has a common interest in all and every asset of the partnership. The share of a partner in the partnership property is determined by ascertaining what is his portion in the firm assets when converted into money after all the firm debts and liabilities are settled.

14. Every partner is the agent of the firm for the conduct of its business, and is entitled to indemnity for payments made or liabilities incurred therein. He is bound to attend diligently to its business, and not entitled to special remuneration, unless by special agreement. He must exercise good faith, and participation in a competing business is not exercising good faith, and he must not violate the partnership agreement.

15. Each partner has a right to participate in the management of the firm business; and no change can be made in the nature of the business without the consent of all.

16. Partnership property must first be applied to the payment of partnership debts. It cannot be used to satisfy the individual debts of the partners, unless all of them consent.

17. Sometimes persons are held liable as partners when in fact they are not. Where one has by words spoken or written or by his conduct led third persons to believe that he is a partner of the firm, or has knowingly permitted himself to be held out as a partner of the firm, he is liable to such third person who on the faith of such representation has given credit to the firm.

18. Since the partners of a firm bear toward each other mutually the relation of principal and agent, each partner may be presumed to have the power as the agent of the firm to act for it in all matters within the usual scope of the partnership business, and third persons may rely on this presumption, unless they have had notice that the partner's powers as an agent for the firm are limited. As to third persons, therefore, without notice of any limitation on the power of a partner to act as the firm's agent, the only question is, is the act one naturally falling within the nature and extent of the class of business in which the partnership is engaged. If so, the partner may act for and bind the firm. All the partners, dormant, secret and nominal are bound by a contract made by one partner if he was acting within his express or implied powers; and all partners are liable for torts committed by one partner if done in the course of business of the firm.

19. Each partner is individually liable to the full amount on all contracts and torts of the firm, but he may have contribution from his partners for all that he pays in excess of his share.

20. A partnership dissolves by limitation when the period for which it was created expires. A partnership will dissolve on the death, bankruptcy or retirement of a partner. A court will dissolve a partnership upon proof of the insanity of one of its members; and also where the conduct of one of the partners has injured the reputation of the firm and the other partners have lost confidence in him. On dissolution of a partnership by act of the parties, notice of the dissolution must be given. All who have had dealings with

the firm are entitled to actual notice, but the public need only be notified by advertisement. Where the partnership is dissolved by order of court, or death of a partner, or a dormant or secret partner retires, no notice is necessary.

21. Where notice of dissolution ought to be given and none has been, persons dealing with members of the dissolved firm, under the belief that the firm is still existent, may hold liable all of its former members.

22. After dissolution a partnership must be wound up and each partner has authority to do all things necessary to close up the partnership. Where the dissolution occurs by reason of the death of one partner, the partnership estate is handled and administered by the surviving partner and not by the legal representatives of the deceased partner.

On dissolution the partnership property is sold and the proceeds must first be applied to paying the firm obligations and the surplus is to be divided among the partners according to their respective interests. Each partner has an equitable lien on all the firm property at the time of dissolution, first, to have the property applied to the payment of the firm debts, and next to have the surplus distributed among the members.

23. Firm creditors by reason of this lien of the partners must first be paid out of the firm assets, and individual creditors are postponed until after they have been paid. By reason of this lien of the partners, individual creditors of a partner may not levy on the firm assets until each partner has received his share of the surplus.

In finally winding up the partnership estate the assets should be applied as follows:

1. To payment of the firm obligations to non-partners.
2. Repayment of advances made by partners.
3. Division of the capital of the firm and any residue among the partners.

**BAILMENTS, INNKEEPERS AND
CARRIERS.**

ANALYSIS.

1. Definition of bailment.
- 2, 3. Classes of bailments.
- 4, 5. Duty of bailee.
6. Contract of bailment.
7. Termination of bailment.
8. Innkeepers.
9. Carriers.

BAILMENTS, INNKEEPERS AND CARRIERS.

PART I.

BAILMENTS.

1. A bailment is a delivery of goods in trust upon contract, express or implied, that the trust shall be faithfully executed on the part of the bailee and the goods restored as soon as the purpose of the bailment shall be accomplished. A bailment must be distinguished from a sale; the former being a contract that the identical goods given to the bailee shall be returned; the latter being a contract whereby the thing delivered is not to be returned but the title in the thing delivered is transferred to the vendee. There is one form of bailment, however, known in the Roman law as a *mutuum*, wherein the thing delivered is not returned but the bailee returns another thing of like kind, quality and quantity. Thus, where money is loaned the borrower returns the like amount of money but not the identical. So, where there is a bailment of grain for consumption, the bailee returns not the identical grain but other grain of the same kind, quality and quantity.

2. Bailments fall into three classes: First, a bailment which is solely for the benefit of the bailor, which the Roman law divided into two kinds, namely: *depositum*, wherein the thing bailed was to be returned and the bailee receive no compensation, and *mandatum*, wherein the thing bailed was delivered to the bailee and the bailee was to do some act pertaining to it but without reward. The second class consisted of bailments for the benefit of both the bailor and bailee, and this the Romans divided into two classes, the first being *pignori acceptum*, or pawn, which was a bailment of personal

property as security, and the second class was bailments for hire, termed by the Latins *locatum*, and divided into three divisions, first, *locatio rei*, or hiring, upon which the hirer gained a temporary use of the thing and in return paid for it; the second division, *locatio operis faciendi*, where something is to be done to the thing delivered and the bailor pays for the doing of the same; and the third division, *locatio operis mercium vehendarum*, wherein the thing is merely to be carried from one place to another and the bailor pays the bailee for carrying the same.

3. The third kind of bailments is a bailment for the sole benefit of the bailee, which the Romans term *commodatum*, and consisted of the bailment or loan of property for a time without payment made by the bailee.

4. Inasmuch as the essential feature of a bailment of any kind is the delivery of the article to the bailee's keeping, and the redelivery by the bailee to the bailor, the chief points to be noticed are the responsibility of the bailee as to the care of the thing bailed and the duty of the bailee to return the thing bailed at the expiration of the bailment.

5. As to the responsibility of the bailee for care of the thing bailed, his duty varies as the kind of the bailment varies. So far as bailments of the first kind is concerned, to wit, bailments for the sole benefit of the bailor, the bailee being without recompense is not held to so high a degree of care as he is in the cases where the bailment is for mutual benefit of both bailee and bailor, and where the bailment is for the benefit solely of the bailee. In the first class of bailments the bailee is held only to slight diligence, and by this is meant that the bailee is not liable unless he has been grossly negligent or acted without any prudence at all. A bailee in a bailment for the mutual benefit of both parties must exercise ordinary diligence, that is, he must employ that degree of care which the average man in the same situation as the bailee would employ. A bailee in the case of a bailment for the sole benefit of the bailee must exercise extraordinary diligence, that is that care which persons of more than ordinary prudence exercise. So

that if the article bailed is lost in the case of a bailment of the first kind the bailee is only responsible if he has failed to exercise slight diligence; in the case of a bailment of the second kind if he has failed to exercise ordinary diligence; and in the case of the third kind if he has failed to exercise extraordinary diligence.

6. The contract of bailments must always be considered with regard to the purpose of the bailment. Where a bailee has no authority to use a thing bailed and uses it, or, having authority to use it in a particular way, uses it in another manner, such an act is regarded as a confiscation of the thing bailed, and the bailor may either sue for the value of the thing, or sue for the recovery of the thing bailed, and for damages; so, also, where the bailee misappropriates the thing bailed or destroys it, the bailor may sue for the value of the article bailed.

7. Upon the termination of the bailment it becomes the duty of the bailee to return the article bailed.

INNKEEPERS.

1. An innkeeper is one who holds himself out to the public by offering to give board and lodgings to transient guests for a reasonable compensation. So long as the innkeeper has accommodations left, he is bound to take in all persons presenting themselves as guests. The innkeeper is an insurer of the baggage of the guest which he brings with him to the inn, and he can only avoid loss or damages to them by showing that it occurred by act of God or public enemy. But modern tendency of the law is to exonerate the innkeeper if he can show that the injury arose from exterior causes over which he had no control. But an innkeeper is not liable for more than the ordinary and customary baggage a traveler has. If the guest carries with him property or money of extraordinary value, he can not make the innkeeper liable for them, as they are beyond the value of baggage usually carried by a transient. An innkeeper has a lien on the goods of the guest for the payment of his charges.

COMMON CARRIERS.

9. A common carrier is one who holds himself out to the public to carry persons and property, or persons or property alone, for a reasonable compensation. A livery stable company is not a common carrier, because it makes a special contract for its undertaking and does not hold itself out to carry all persons. A common carrier may confine itself to a particular line of work, as to carry freight alone or particular lines of freight. Because of the public character of the work, the law imposes peculiar burdens on common carriers. A common carrier of passengers must exercise the highest possible degree of care to its passengers. A common carrier of freight must protect the freight from all loss or injury, virtually insuring their safe delivery, and can only excuse a failure so to do in case the loss occurred through an act of God, or of the public enemy, or interference of public authority. So if the loss occurs jointly from an act of God and the negligence of the carrier, the carrier is liable. A carrier must possess facilities to carry all persons or property which from past conditions it ought to have anticipated would be presented for carriage, and is liable for a failure so to do. In the carriage of live stock and fruit, etc., which from their inherent nature are subject to perish, the carrier is not liable as an insurer, if they perish in spite of his diligence to protect against it. Otherwise the carrier is liable. A carrier undertakes to deliver within a reasonable time, and if by reason of delay loss is suffered, it is liable. A common carrier of passengers is a common carrier of freight as to the passenger's baggage, except as to hand baggage which the passenger has with him. Here is a case of mixed custody, the hand baggage being at once in the custody of the carrier and the passenger, and the carrier is not an insurer as to it. Sleeping car companies are not common carriers, nor are they innkeepers, and are liable only as bailees for a reasonable degree of care. After the carrier has completed the carriage and has given the consignee a reasonable opportunity to

get the goods, its duty and liability as a common carrier ends and it is only liable as an ordinary bailee — on the theory of a warehouseman.

A common carrier of persons or freight must be provided with the usual appliances and improvements, which time and experience have shown necessary for safe carriage. The carrier, however, need not have the very latest patents and improvements.

The question of negligence of carriers in carrying passengers and freight are treated under the head of Negligence in the division on Torts.

LAW OF CORPORATIONS.

ANALYSIS.

1. Definition.
2. Kinds of corporations.
3. Creation of corporations.
4. Characteristics of corporations.
5. Irregular or de facto corporations.
6. Citizenship of corporations.
7. Foreign corporations.
8. Promoters and their acts — Subscriptions to stock.
9. Securing the charter.
10. The charter — A contract — Police powers.
11. Powers of a corporation — Express and implied.
12. Ultra-vires acts.
13. Some customary powers of a corporation.
14. Power of a corporation to acquire its own stock and stock in another company.
15. Corporate agents — Officers and Directors.
16. Stock.
17. Stockholder's right of management.
18. Creditors.
19. Dividends.
20. Relation of the State to the corporation.
21. Dissolution of corporation.

CORPORATIONS.

1. A corporation is an artificial being, created by the State for some defined purpose, and permitted to do business under a particular name and have a succession of members without dissolution.

Corporations differ from partnerships in that the partners never lose their identity, that a change of partners terminates the partnership, that partners are liable for the firm debts, and a partnership needs no legislative authority to create it, while a corporation is distinct from the individuals (shareholders) composing it. One shareholder may withdraw and substitute another in his place. The debts of the corporation are not the debts of shareholders. The debts of the partnership are also the debts of each partner.

2. Kinds of Corporations.

1. Public and Private Corporations. Public corporations are those which have to do with the government of people. Private corporations embrace all other corporations. The distinction between these two kinds is, that the legislature which authorized their creation, may alter, limit or extend the powers of a public corporation or even abolish it, but may not do so as to a private corporation.

Private corporations are of many kinds, as ecclesiastical and lay corporations; the former being devoted to religious purposes; the latter to secular purposes. Lay corporations are of two kinds, eleemosynary and civil. Eleemosynary corporations are devoted to charitable objects; civil corporations are devoted to various objects of a business nature.

Corporations are also sole or aggregate. A corporation sole consists of a single person and his successors, who is made a body corporate and politic in order to give him some legal capacities and advantages, particularly that of perpetuity, which in his natural person he could not have had. Examples

of a corporate sole are king and bishop and certain other church officials of England, who hold property as a corporation sole. This class of corporation does not exist in the United States. Corporations aggregate consist of many persons united together in one society, and are kept up by a perpetual succession of members so as to continue forever.

3. Creation of Corporations.

The power to create corporations is usually expressly conferred by constitutions on the legislature, but where not expressly conferred it is said to be impliedly conferred as an incident to other powers expressly vested in the legislature. Formerly corporations were created by special legislative acts, but constitutions now forbid special acts of incorporation, and general acts of incorporation universally exist, under which persons may incorporate as a corporate body. These general incorporation acts designate the purposes for which persons may incorporate, and the powers of the incorporated bodies. The acts also designate the method of incorporating. This is usually done by filing with designated officials for recording, the articles of incorporation. These articles set forth certain essential facts, chief among which are the name of the proposed corporation and its proposed headquarters, the purposes for which the incorporation is sought, its total capital stock, and the number of shares into which it is divided, the names of the shareholders and the number of shares each take, and the number and names of its first board of directors. Upon the filing of the articles of incorporation and due compliance with other statutory requirements, a certificate of incorporation is granted.

4. Characteristics of Corporations.

Every aggregate corporation had five certain incidents and attributes, to wit: 1. Perpetual succession; 2. To sue and be sued; 3. To purchase and hold lands; 4. A common seal; 5. The right to make by-laws.

Perpetual Succession. — Formerly corporations were created for no definite period, but to continue indefinitely. Now generally the number of years a corporation may exist is fixed by law. A corporation has perpetual succession of

its members during its existence, whether for a fixed or indefinite period of years. By this is meant that its members, i. e. shareholders, may die or otherwise be removed, and new members may perpetually succeed retiring members during the corporate existence without disturbance of the affairs of the corporation.

Name. — A corporation being an artificial being, must possess a name to distinguish and identify it, and frequently its right to the exclusive use of the chosen name is assured to it by law.

Seal. — Every corporation possesses a seal, and, at common law, no corporate contract was valid unless sealed with the corporate seal by an authorized agent. Originally a seal had to be a wax or a wafer, and impressed with the seal of the corporation. Under modern laws the impress of the seal may be made directly on the paper itself, or may be simply a scroll drawn on the paper.

Sue and be Sued. — A corporation may sue and be sued, implead and be impleaded, and grant and receive by its corporate name.

Acquiring Lands. — A corporation may acquire lands and hold them for its benefit if it is within the scope of its powers as defined by its charter.

5. Irregular or De Facto Corporations.

In incorporating under general laws, the incorporators have to follow the procedure set forth in the statutes. A correct compliance with this procedure results in a perfect incorporation, but where the incorporators have failed to comply fully the question is, have the incorporators been incorporated or not? It is held that if the non-compliance be as to a necessary step in the process of incorporation, there has been no incorporation; but if as to immaterial matters, there has been.

Where the incorporation is defective by reason of non-compliance with the statutory requirements, many courts hold that the stockholders are liable on the corporate contracts as partners, for the reason that there being no corporation there can be no corporate liability and the incorporators are only part-

ners, and as such are liable for all the obligations incurred. Other courts hold that if there is a bona fide attempt to incorporate under an existing law, a corporation de facto arises, and that the incorporators are estopped from denying the corporate existence, and its creditors who dealt with it as a corporation are likewise estopped, and that the State alone may call in question the validity of the incorporation, and until it does it must be treated as a corporation.

6. Citizenship of Corporations.

The Federal constitution extends the judicial powers to causes between "citizens of different States," and in a case where a corporation is a party, the question arises, what is the citizenship of the corporation? Up to 1844 it was the rule that a corporation was a citizen of the State which created it, provided all of its members were alleged to be citizens of the same State. In 1844 the Supreme Court declared that a corporation created by a given State was a citizen of that State like a natural person, and that the members of the corporation must be conclusively presumed to be citizens of the State creating the corporation.

7. Foreign Corporations.

A corporation, being an artificial being, created by the laws of the State where it is incorporated, has no legal existence beyond the territorial limits of the sovereignty creating it. But by the rule of comity, corporations of one State may do business in another State. The rule of comity, where one State through courtesy permits a corporation of another State to do business within its borders, is now so well established that it may be said that a foreign corporation may transact any business not repugnant to the policy, interests or laws of the State where it seeks to do business, and not forbidden by the laws of the State incorporating the foreign corporation. However, States do exercise control over foreign corporations by requiring of them compliance with certain formalities before allowing them to do business, but if these formalities are complied with, no unfair discrimination between foreign and domestic corporations is permissible.

8. Promoters and their acts.

Subscriptions to stock.— The corporation is organized by its promoters. Promoters are those who obtain the subscriptions of persons for stock in the corporation proposed to be incorporated. Promoters are not agents for the corporation, because, when the promoters act, the corporation is not existent. Promoters are liable for their acts and contracts, and the corporation they promote is not, when incorporated, liable on its promoters' acts and contracts unless it expressly ratifies and accepts them upon a full knowledge of all the facts. The relation between the promoters and the corporation is quasi fiduciary, and the acts of the promoter toward the company will be closely scrutinized.

The agreement to take stock in the proposed corporation is binding, being regarded as continuing offers to take stock upon the organization of the corporation, and they ripen into binding contracts when the corporation, after becoming a corporate body, accepts the offer. So, also, it is frequently held that the agreement is based on the mutual promise of the various subscribers.

9. Securing the charter.

The promoters having launched the proposed corporation, and secured the needed subscribers to the stock of the proposed corporation, the next step is to secure the charter. Formerly corporations were created by special legislative acts, but constitutions now universally forbid such special acts, and corporations are formed under general laws. The instrument evidencing the act of the legislature creating a corporation is called the charter, but the mere enactment of a charter by the legislature does not create a corporation. The charter must be accepted by the incorporators. So, under modern laws the incorporators apply for a charter by signing a paper declaring that they associate for the purpose of forming a corporation under the general laws, and stating the name and location of the proposed corporation, its purposes, the amount of its capital stock, and the number of shares, the names of the shareholders and the number of shares they have

subscribed. Upon compliance with the legal requirements, a certificate of incorporation is issued. But the charter thus conferred must be accepted by the corporation. This acceptance may be by formal action of the incorporators at the meeting held for the purpose of organizing, or it may be inferred from the lapse of time and a use of the charter.

10. The Charter — A Contract — Police Powers.

The charter is supposed to embrace an offer on the part of the State to incorporate the incorporators for the purposes and along the lines set forth in it, and an acceptance by the incorporators, thus forming a contract between the State on the one part and the incorporators and their successors on the other. For this reason it was held in the case of *Trustees of Dartmouth College v. Woodward*, that the legislature could pass no law which might impair the rights conferred in the charter, for to do so would be to impair the obligation of a contract. For this reason laws are now universally in force, reserving to the legislature the power to amend, alter or repeal charters, and hence the incorporators take their charter subject to such reservation, and as an element of the charter; and a subsequent exercise of the right thus reserved, would thus be in accordance with the contract, and would not, therefore, impair its obligation. But the doctrine that a corporate charter is a contract and cannot be altered, amended or repealed by the legislature, does not prevent the legislature from passing subsequent acts for the regulation of public health or morals which may impair the rights granted under the charter, for a legislature never contracts away its right to exercise its police powers and a valid exercise of its police power does not infringe its contract with the corporators, no matter how much it may curtail the powers contained in the charter.

11. Powers of a corporation — Express and implied.

The charter defines the powers of a corporation, for in it is found the purposes for which it is incorporated, and a corporation has no powers further than are necessary to accomplish such purposes. Corporate powers are of two varieties, express and implied. Express powers are those expressly con-

ferred on the corporation in the charter; implied powers are such as are necessary and incident to attaining the purposes of the corporation, and are hence said to be impliedly conferred on the corporation. Courts, in determining corporate powers, construe corporate charters liberally, unless the power be one against common right, as where the corporation claims some exclusive monopoly. All persons dealing with a corporation must first learn whether the corporation has the power to act in the particular matter, and every one is presumed to have notice of the powers of the corporation.

12. Ultra-vires acts.

Acts of a corporation beyond its powers are termed ultra-vires acts. As a rule such acts are void, but several things must be born in mind. If the ultra vires contract be wholly executory, i. e., neither side has begun its performance, neither party to it may compel its performance or get damages for its non-performance, for the contract being without the corporate powers is no contract so far as the corporation is concerned, and the other party to the contract not having begun performance is presumably in no worse position than if no contract had been made. The rule is the same where the ultra-vires contract has only been partly executed; the other party to it may not compel the further execution of the ultra-vires contract by the corporation.

As to executed ultra-vires contracts, the rule is somewhat different. If the contract be illegal or immoral, the corporation may not be compelled to perform its part, even though the other party has performed, but if the ultra-vires contract be not illegal or immoral and the other party has performed its part, the corporation having accepted the benefit of the contract will be estopped to set up the ultra-vires nature of the contract, and must perform its part of it. In such a case, the State incorporating the corporation is the only party which may complain of the ultra-vires contract. So, if the corporation has performed its part of an ultra-vires contract, the other party having received the benefit, may not set up as a defense the ultra-vires nature of the contract.

But this rule applies only to private corporations; it is different where the corporation is one of a public nature, as a municipal corporation, or of quasi-public nature, as a railroad, bank, etc. A municipal corporation is but a minor department of the State, and it has only those powers expressly conferred on it by the constitution and the legislature. Any contract attempted by it without the powers so conferred is absolutely void. Quasi-public corporations are organized to perform certain public duties, as railroads, ferries, etc., and because of the public need for such corporations the public is, in a sense, a party to the contract of incorporation, and may demand that the corporation perform its public duties. So, if a quasi-public corporation does any act or makes any contract which puts it beyond its power to perform the public duty or impairs its ability to perform it, such contract is ultra-vires, because it tends to destroy the very purpose for which the corporation was organized, and such contracts are absolutely null and void.

13. Some customary powers of a corporation.

Every corporation may acquire land for the purpose of carrying out its corporate object, unless expressly forbidden. Every corporation may sell or mortgage any property, if such sale or mortgage does not interfere in the conduct of its business, and may borrow money and issue negotiable notes.

14. Power of a corporation to acquire its own stock, and stock in another company.

In England it is ultra vires for a corporation to purchase its own shares, unless it acquires them as collateral for a loan, or in payment of a debt. In the United States the same rule prevails in some States, but in others it is not ultra-vires unless it appears that the purchase was not for the benefit of all the stockholders, but benefited the directors, or part of the stockholders, or unless it appears it operated to the injury of the creditors, or defeated the corporate purposes, or was done for some other fraudulent reason.

Corporations may not purchase stock of other corporations except where the corporate business contemplates dealings in

stock; but any corporation may lawfully acquire stock as security for a debt or payment of the same, where there is no intention of permanently holding the stock. Such purchases are ultra-vires, because they divert the corporate funds from the use of the purchasing corporation to employ them for the benefit of the corporation whose shares are purchased.

15. Corporate Agents — Officers and Directors.

Corporations being artificial beings, may only act through agents. These agents are of two classes, first, the officers; second, the directors. The officers are generally the president, vice-president, secretary and treasurer, and they are usually directors of the company and are elected by the directors. The powers and duties of the officers depend upon the charter and by-laws of the company, the regulations adopted by the directors, and the laws of the State. In general it may be said that the officers are merely the administrative agents of the corporation, who carry out the policy of the corporation as determined by the directors.

The directors are stockholders of the corporation, and are elected by them for a given term. In them reposes the direction and management of the corporation, and no stockholder may object to anything the directors do which is not ultra-vires the corporation which is honestly done, and in the usual course of the corporate business, but fundamental changes in the corporate condition or purposes may only be done by vote of the stockholders. Directors are held only to the care reasonably prudent directors ought to employ, but both officers and directors are regarded as trustees, and dealings between themselves and the corporation are subject to the closest scrutiny. Directors occupy a trust relationship to the corporation, and their actions are subject to close scrutiny. Decisions vary as to the validity of contracts made by a director with the corporation; some decide that the director's position to the corporation makes it against the law's policy to recognize as valid such contracts; others that if after close examination the contract is found to be fair, it is a valid one.

16. Stock.

Capital stock of a corporation is the amount of funds prescribed to be contributed by the stockholders at the inception of the corporation for its purposes. **Shares of stock** are aliquot parts of the capital stock, and are represented by certificates issued by the corporation to the effect that the person named in the certificate is the owner of so many shares of the capital stock. Shares of stock are goods, wares and merchandise within the meaning of the statute of frauds. Title to stock is passed by delivering the certificate with a blank assignment of it, and a power to transfer the same indorsed and signed by the holder of it. The assignee is authorized to fill it up by writing a transfer and power of attorney over the signature. As between the parties, such an assignment passes both the legal and equitable title in the shares. Corporations by charter or by law, however, provided that stock is only transferable on the books of the company. Such a provision does not prevent the shareholder from parting with his interest by assignment, but does protect the corporation by giving priority to the corporation over the assignee for whatever liens or claims it may have on the stock.

A certificate of stock is not negotiable paper, and the assignee of it takes it subject to all equities which may be urged against the assignor. Whoever may be the owner and holder of the stock, so far as the corporation is concerned, he is the owner in whose name the stock stands in the corporation books until notice or proof is given the corporation that another party is the owner.

Preferred stock is such part of the whole stock designated by the charter to receive certain dividends out of the net earnings of the company before any dividends are paid on the common stock. If it be so declared, dividends on preferred stock may be cumulative; that is, on failure in one year to pay the dividend, the company must pay all the cumulative dividend due on the preferred stock before paying dividend on the common stock.

Dividends are declared by the directors. They can only be

declared when the net earnings of the company warrant. Directors are liable to creditors for wrongfully declaring dividends.

17. Shareholders have the right to examine all the books and records of the corporation at all seasonable times and to be informed of its condition.

A majority of stockholders may bind the entire corporation as to all transactions within the scope of its corporate powers, but the majority must use the utmost good faith in the control and management of the corporation as to the minority.

Shareholders may restrain the officers of the corporation from doing anything ultra vires the corporation; but they have no right to object to any act done in good faith by the officers and directors within the powers of the corporation. Directors and other officers are officers of the corporation primarily, yet they are trustees for all the shareholders as well.

18. The capital of a corporation is its property. It may use the income of it, and sell and dispose of it the same as a natural person. So long as the corporation is solvent no creditor may interfere with its property until he has gotten a judgment. Upon insolvency or dissolution of the corporation the assets of the corporation must first be applied to the payment of its creditors and the balance left thereafter will be distributed among the stockholders. It is frequently said that the capital stock and assets of a corporation are a trust fund for its creditors, but except as above set forth this statement is meaningless. What the statement does mean is that upon insolvency or dissolution of a corporation the capital stock and assets of the company are put in a condition of trust first for the creditors and then for the stockholders. Unless the statute imposes upon stockholders additional liabilities a stockholder is not liable to a creditor for more than the stock he holds. If the stock he holds has all been fully paid up to the corporation then he is under no liability — if there be a balance unpaid then to the extent of the unpaid balance he was a debtor to the corporation, which indebtedness is regarded as a corporate asset, and

upon the insolvency of the corporation may be collected for the benefit of the creditors.

19. Dividends are payments made to stockholders by the corporation out of the net earnings of the company. Dividends are declared by the directors, and the directors may only declare them when the net earnings of the company are sufficient. They cannot be paid out of the corporate capital. The declaring of dividends is left to the discretion of the directors, and the directors cannot be compelled to declare a dividend even though the net earnings of the company are sufficient if the directors in good faith determine not to declare a dividend, but to accumulate a surplus, etc., to be used in the business of the corporation. Once a dividend is declared it belongs to the stockholder and the corporation holds it as a trustee. The dividend so far as the corporation is concerned, belongs to the person in whose name the stock stands in the company's books.

Stock of a corporation is sometimes divided into preferred and common stock. Preferred stock is stock upon which a dividend of a given per cent is paid before any dividend is paid on the common stock. Dividends on preferred stock may be cumulative, that is if there are arrears or failures to pay the preferred dividends these arrears must be paid before any dividend can be paid on the common stock.

20. The Federal Constitution provides that no State shall pass a law impairing the obligation of contracts. In the case of *Trustees of Dartmouth College v. Woodward*, the Supreme Court of the United States decided that the charter of a corporation was a contract and that to alter the charter was to impair the obligation of a contract and unconstitutional.

The contract is based upon the State giving the incorporators the right to incorporate as a consideration moving from the State, and the advantage to the public to have the corporation as a consideration moving from the incorporators. Theoretically the State is supposed to offer the charter and the corporation to accept it. Because of this decision that a corporate charter is a contract and hence cannot be impaired, State constitu-

tions universally provide that all charters are granted subject to the power to alter, amend and repeal. But the decision in the Dartmouth College case has never been carried so far as to prevent regulation of corporations on the ground of police powers. The interest of the State in the matter of health, safety and morals is paramount and this is the domain of police powers. If in a proper exercise of police powers a corporate charter is impaired this is no impairment of a contract since a State can never contract away its police powers.

21. A corporation may be dissolved: 1. By expiration of the time limited by its charter. 2. By voluntary dissolution under statutes providing for the same. 3. By repeal of its charter; and 4, by forfeiture of its charter. The effect of a dissolution is that the corporation may not longer exercise corporate powers and its assets are a fund out of which the creditors are to be paid first, and after that the balance is to be divided among the stockholders.

THE LAW OF DOMESTIC RELATIONS.

DOMESTIC RELATIONS.

Domestic relations, as the term itself implies, was originally confined entirely to the law of the household or family, as distinguished from the law as applied to individuals in the external or business concerns of life.

There are four great divisions of the law of Domestic Relations: 1, MASTER and SERVANT; 2, HUSBAND and WIFE; 3, PARENT and CHILD; 4, GUARDIAN and WARD.

DOMESTIC RELATIONS.

1. MASTER AND SERVANT.

ANALYSIS.

1. General statement.
2. Definitions.
3. The contract.
4. Abandonment of service by servants, and "discharge" by master.
5. Rights and remedies of servants wrongfully discharged.
6. Wages and compensation.
7. Excuses for non-performance of service.
8. Trade secrets and inventions.
9. Servant's liability for his own negligence or misconduct.
10. Master's liability for personal injuries to servant.
11. Master's liability to third persons for acts of servant.
12. Fellow-servant rule.

1. While originally confined almost entirely to questions arising in the family or household life, the doctrines of MASTER and SERVANT have now extended far beyond the bounds of domestic relations. This most important, as well as most difficult, questions of this subject are now those which arise in general business life between employer and employe.

2. A MASTER is one who stands to another in such a relation that he not only controls the results of the work of the other, but also may direct the manner in which such work shall be done. Herein lies one of the great differences between the doctrines of master and servant and those of principal and agent. The master may direct, not only what the servant is to do, but how he is to do it. The master may recall his orders, change his mind, or undo what has been done, without making himself liable to the servant for breach of contract. A principal, on the other hand, by contract directs what is to be done, but the agent is entitled to his own discretion as to the means he shall use, unless they are settled by the contract.

A SERVANT is one who is employed to render personal services to his employer, otherwise than in pursuits of an independent business.

3. The relation of master and servant depends on CONTRACT, express or implied. The contract is governed by the same principles which apply to contracts generally. For instance, if the contract cannot be performed within a year, it must be in writing. A contract of hiring may be terminated or discharged like any other contract. Where the duration of the service is not stipulated in the contract, in England it is presumed to be for a year, but this may be rebutted. In most jurisdictions in this country such a contract is *prima facie* terminable at will by either party. Where the contract contains stipulations as to periods of payment, the length of service may be inferred therefrom. A contract for a period "not exceeding" a designated term, has been held to be a contract of indefinite duration.

4. A servant is justified in ABANDONING a contract of service when the master does any act which necessarily prevents performance of the service, when the master refuses to make payment as contemplated, where he reduces the servant's wages, or where he commits an assault on the servant. The servant is not justified in so abandoning the service for mere harsh words, or fault-finding, unless thereby his comfort is reasonably impaired, nor on account of a disagreement with a fellow-servant. A servant who wrongfully abandons a contract is not entitled to compensation for work already performed, if the contract is an entire one. A master may rightfully DISCHARGE a servant for any of the following grounds: Neglect of duty; incapacity to work caused by illness, if the illness is such as will extend over an important portion of the duration of service, or where time of recovery is uncertain, or where the need of the service is urgent; insolence or disrespect towards the master, or towards customers or friends of the latter; intoxication, if it renders the servant at any time unfit for service; gambling, if servant occupies a fiduciary capacity; engaging in other employment;

incompetency; disobedience; or anything inconsistent with contract of hiring. The master may waive his rights to discharge the servant, and retention after the occurrence of the ground of discharge is *prima facie* evidence of such waiver.

5. After a wrongful discharge a servant can, of course, sue for sums actually earned and due by terms of the contract. He may treat the contract as rescinded and sue on a *quantum meruit* for the value of his services. Again, the servant may treat the contract as continuing and sue for a breach, either at once or at the expiration of the term. The master cannot be compelled by a decree of court to retain a servant in his employ. A servant has a cause of action against one who maliciously causes his discharge when his contract was for either a certain or uncertain period.

6. When amount of WAGES OR COMPENSATION is not fixed by the contract, the servant is entitled to the reasonable value of his services. When payment of wages is to depend on a contingency and the contingency does not happen, the servant cannot recover anything, irrespective of the question of benefit to the master. When wages are to depend on profits of business, the servant is not a partner, unless he has some further interest in the capital or business of the master. In such cases "profit" means "net profit," and the remedy of servant is by an action at law to recover the value of his services. He can not compel an accounting. Where master promises to pay extra for services within ordinary scope of employment this promise is without consideration. If servant performs extra services not within his ordinary duties, he still cannot recover therefor, if he has performed such services voluntarily. Where the contract is an entire one the servant forfeits all wages due by leaving before the end of his time. Stipulations in contracts for forfeiture of wages, for maintenance, for misconduct, are strictly construed against the master. Such a stipulation if unreasonable is void in many jurisdictions. When nothing is said about time of payment, it is presumed to be at expiration of term. In an action by servant to recover wages, the master may show by way of set-off any

injury that he has sustained by reason of the servant's negligence or misconduct. Where contract is for the whole time of the servants, the master is entitled to any compensation the servant receives for services to outside parties. In many jurisdictions a servant is given by statute a lien upon property of master in certain cases for wages performed within a certain time. These statutes are by no means uniform.

7. Death of master is termination of contract, but insanity is not. Voluntary dissolution of a partnership is not a termination but dissolution by the death of a partner is a termination. Performance prevented by acts of the law is excuse for non-performance.

8. Where a confidential relation exists between master and servant, the servant will be restrained by equity from revealing or using for his own advantage any TRADE SECRETS of the master. It is the same where there is an express stipulation to that effect in the contract, or where servant acquires his knowledge surreptitiously. Where the servant is employed to devise or perfect an instrument he cannot use such perfected instruments for any purpose of his own. Where, however, the servant is merely performing general duties in a particular department of service, he can control absolutely any invention he may conceive or perfect while thus employed.

9. Servant's liability for their own negligence or other misconduct is governed by the ordinary doctrines of torts. The servant is liable to the master for any damage, either negligent or wilfull, inflicted directly upon the master, or for which the master has been forced to pay others. The servant is not liable to third parties for mere nonfeasance.

10. A master is bound to use ordinary care to prevent injury to servant in the course of the employment, and cannot contract for exemption from failure to do so. The master must furnish a reasonably safe place in which to work. This must vary in individual cases in accordance with the character of the work. The same rule applies to machinery and appliances. This duty of the master is a continuing one and the servant may rely upon the performance of this duty by the

master. Of course the servant must be himself free from continued negligence, in order to recover. It is the duty of the master to adopt, and make known to employes, reasonable rules for the carrying on of a dangerous business, and for the protection of the employes.

A servant is presumed to have notice of and to have assumed all risks incident to all dangers and defects which to a person of his experience and understanding are or ought to be patent and obvious.

11. The question as to how far a master is liable to third parties for acts of a servant is governed by the ordinary doctrines of agency. The master may maintain action against third persons for any loss of services due to an injury inflicted upon the servant by such third person.

12. Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable, where there is no countervailing statute, to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service. This rule does not relieve the master from liability for the consequences of his own negligence or the negligent servant. Thus the master is liable for the torts of a servant to the latter's fellow-servants, if the servant is known to the master to be incompetent, or if the master has negligently employed an incompetent servant. In many States the doctrine does not apply where one servant is given power to superintend the actions of the others. This is the so-called "superior servant" limitation. Where one servant is injured by the negligent performance by another of the personal duties which every master owes to his servants, then the master is universally held liable. This is the "vice-principal" limitation. Some States have added a limitation where the servants are employed in different departments of service. In some States by statute railroad companies are excepted from the application of the fellow-servant rule. These statutes have been held constitutional and the railroads are not allowed

to contract against this liability. Fellow-servants are those engaged in a common employment. A common employment is generally held to be service of such a kind that all who engage in it in the exercise of ordinary sagacity, may be able to foresee that the carelessness of fellow-servants may probably expose them to injury.

HUSBAND AND WIFE.

ANALYSIS.

1. Marriage.
2. Rights of husband.
3. Wife's separate estate.
4. Dower and courtesy.
5. Disabilities arising from coverture.
6. Liability of husband for acts of wife.
7. Divorce.

1. **Marriage** is a civil status existing between one man and one woman, and arises out of a contract between them to live together as husband and wife. As in the case of an ordinary contract, there must be mutual consent and capacity to contract. There are certain disabilities which render parties incapable of making a valid contract of marriage. These are now: 1, Usually relationship nearer than cousins; 2, prior marriage undissolved; 3, want of mental capacity; 4, want of age. The age at which parties are capable of making a marriage contract varies from fourteen to eighteen in males and twelve to sixteen in females. At common law the age of legal consent was fourteen for males and twelve for females. In the absence of statute no formalities were necessary at common law, but statutes have made certain formalities requisite in practically every jurisdiction.

2. By virtue of the marriage status the husband has certain **personal rights**. He is the head of the family. He can fix the residence or domicile of the family. The husband may restrain the liberty of the wife when it is necessary to prevent her from committing a crime or adultery, and perhaps a tort for which he would be liable. The husband has a right to the services of his wife, and may maintain an action against any one who wrongfully deprives him of them.

By virtue of the marriage status the husband has also certain rights in and to the property of the wife. Of the wife's freehold estates the husband is seized during coverture,

and is entitled to all the rents and profits. He cannot, however, dispose of or incumber the estate which remains to the wife or her heirs after coverture ceases. In the wife's chattels real the husband acquires a sort of joint tenancy. He may sell, assign, mortgage or otherwise dispose of them during coverture. They are liable for his debts and, after the death of the wife, become his, absolutely, subject to her ante-nuptial debts. He cannot leave them by will so as to defeat the wife's right of survivorship. The personal chattels which belong to wife at time of marriage, or which come to her during coverture, vest absolutely in the husband. He is entitled to her choses in action if he reduces them to possession during coverture. On his death they vest in his representatives except the wife's paraphernalia, that is, articles of wearing apparel or personal ornament. Statutes, however, usually provide for an allowance to wife out of the personal estate, which is usually prior even to the debts of the husband.

3. The wife's equitable separate estate is the name given to the estate, real or personal, which equity permits a married woman to hold free from the control of her husband. To create such an estate, it must be settled to her sole and separate use. She usually has power to convey such estate, without a provision to that effect in the instrument creating the estate, and in most States the wife may change such estate by contract. By statute in most States the wife is given power to hold her own property free from the control of her husband.

4. The principles relating to dower and courtesy are treated under the head of Real Property.

5. Marriage imposes no disabilities upon the husband except so far as he is incapacitated from entering into valid transactions with the wife. The wife, however, is incapacitated at common law from acting as a feme sole. She cannot make a binding contract even with her husband's consent. This is true even as to necessities. But a contract executed by the wife is enforceable against the other party. But in equity a married woman may charge her equitable separate estate. In most jurisdictions, however, enabling statutes have

been passed, by which the disability of a married woman to contract has either been abrogated or greatly modified. Except under a marriage settlement, or with her husband's consent, at common law a married woman could not dispose of her personalty by will. The same was true of her realty, even with the husband's consent. This has also been to a great extent changed by statute. A feme covert could not sue or be sued unless her husband were joined. Where necessity required that a feme covert should act as a feme sole, the disability was removed, for example, where the husband was an alien or banished.

6. The husband was liable at common law on the ante-nuptial contracts of the wife to the extent of the property he received from her. Statutes allowing the wife to hold property of her own, do not take away this liability of the husband. This liability only exists during coverture. The husband is not liable on contracts made by the wife during coverture, but may be charged for necessities supplied to her. The husband during coverture is liable for the torts committed by the wife, either before or during coverture; and the wife is jointly liable with him unless the tort was committed in his presence and by his direction and command. If it is committed in his presence the presumption is, that it is committed by his direction and command. The same presumption exists in case of crimes, but in either case may be rebutted. Further than this presumption the husband is not held for the crimes of the wife. They are liable for crimes committed upon each other, except, at common law, larceny, burglary or arson.

7. Divorce is the legal separation of husband and wife by the judgment of a court. At common law there were two kinds, a *mensa et thoro*, from bed and board, and a *vinculo matrimonii*, a total divorce from the bonds of matrimony. A judicial separation has now taken the place of the common law divorce *a mensa et thoro*. The causes generally recognized as grounds for divorce are adultery, impotency, cruelty, fraud in obtaining the marriage and desertion. An absolute divorce puts an end to all property rights dependent on marriage.

PARENT AND CHILD.

ANALYSIS.

1. Rights of Parents.
2. Duties of Parents.
3. Liabilities of Parent.
4. Emancipation.

1. The father has the right to name a child and giving the child a particular name at the request of a third person is sufficient consideration to support a contract as against said third person. The father has a paramount right to the custody of the child. If the father is unfit, however, the custody of the child will be given to the mother. The welfare of the child is the guiding consideration. A contract by the parent to surrender the custody of the child to any person is void as against public policy. The parent has a right to the services and earnings of a minor child while under the parent's care and protection. This is based upon the idea of compensation to the parents for maintenance. The parent may recover compensation for the services of the child performed for a third person, unless the parent has waived this right. A failure on the part of the parent to furnish a child with a home, will constitute such a waiver. A person *in loco parentis* has the same rights as a parent, for example, a grandfather with whom the child lives, or a person who has adopted it. The parent has no rights over the property of the child, but the title to such property as the parent furnishes to the child in the way of support remains in the parent. When a child is wrongfully injured, or seduced, by a third person, the parent may maintain an action for any damage he has suffered by reason of the loss of services. The right to the services of the child may be reached by the creditors of the parent.

2. Some courts hold that the duty of the parent to support the child is a mere moral duty but the majority treat the duty as a legal one. This is irrespective of the amount of property

owned by the child. When the parent is unable to support a child and the child has property of its own, equity will often make the parent an allowance out of the child's property for the latter's support. A parent who does not furnish necessities to the child is liable to third persons who do so. There is no legal duty upon the parent to furnish legal education to the child.

3. The parent is never liable for the wrongful acts of a child unless such acts were performed with the parent's consent, or in connection with the parent's business. Whether a parent is liable on a contract made by a child, must be determined by the ordinary doctrines of agency.

4. Emancipation of a minor is not to be presumed but must be proved. A child upon attaining full age is presumed to be emancipated, and the parent's authority over it at an end. A parent may by agreement emancipate a child.

GUARDIAN AND WARD.

ANALYSIS.

1. General statement.
2. Rights and duties of a guardian with respect to the ward's person.
3. Duties of guardian with respect to the ward's estate.
4. Termination of guardianship.

1. A GUARDIAN is one to whom the law intrusts the persons or estates, or both, of those who, by reason of their infancy or some mental infirmity, are not *sui juris*. At common law there are four kinds of guardians: in chivalry, in socage, by nature, and for nurture. The most important forms of modern guardians are: testamentary, judicial and *ad litem*. A testamentary guardian is an appointee by will. Such power of appointment by will is by some statutes in the father alone, but generally confined to the surviving parent. A judicial guardian is one appointed by a court of competent jurisdiction, which is generally, in the absence of a statute to the contrary, a court of equity. A guardian *ad litem* is one appointed by a court to prosecute or defend for an infant in a suit to which the infant is a party.

2. The guardian is ordinarily entitled to the custody of the ward, except, in this country, as against the parents; but he is not entitled to the ward's services or earnings. He is bound to maintain the ward from the income of the ward's estate, but he cannot bind the principal of the estate without leave of court; and he is not bound personally to furnish support. He cannot by contract bind either the ward or the ward's estate, and is personally liable on such contracts. Guardians, other than the parents who are sometimes called natural guardians, cannot change the state or national domicile of the ward, though they can change the municipal domicile.

3. It is the duty of the guardian to collect all rents, profits, and other dues, pay the expenses, deposit and invest the ward's

money, lease his lands, keep the estate in repair, and in general to exercise the same care and foresight in the management of the estate as a prudent business man would exercise in the management of his own estate. The guardian is subject to the same rules as a trustee. He cannot, therefore, reap any personal benefit from the management of the ward's estate, nor sell to or purchase from the ward. If a guardian exceeds his authority he is liable for any loss, and must account for any profit.

4. Guardianship is terminated: 1. By the ward's reaching his majority. 2. By the death of the ward. 3. By the death of the guardian. 4. By the marriage of a female ward. 5. Under some statutes, by the marriage of a female guardian. 6. By the resignation of the guardian. 7. By the removal of the guardian.

THE LAW OF TORTS.

ANALYSIS.

1. What is a tort.
2. Tort distinguished from crimes.
3. Torts and contracts.
4. Elements of a tort.
5. Who are liable for torts.
6. Torts — How redressed.
7. *Volenti non fit injuria*.
8. Torts against personal security.
9. Torts against personal liberty.
10. Torts affecting relative rights.
11. Torts in confidential relations and torts growing out of neglects of official duties.
12. Torts affecting personal property.
13. Torts involving fraud.
14. Negligence.
15. Discussion of negligence.
16. Elements of negligence.
17. Proximate cause.
18. Standard of care.
19. Contributory negligence, comparative negligence and imputed negligence.
20. Nuisances.
21. Public and private nuisances.
22. Nuisances *per se*.
23. Elements of a nuisance.
24. Locality as determining a nuisance.
25. No classification of nuisances possible.

THE LAW OF TORTS.

1. **A tort is a private wrong.** There are three kinds of wrongs or illegal acts: first, those which are wrongs against the public and are called crimes; second, wrongs which arise from the breach of contracts; and third, those which arise independent of contracts, and to this last class belong torts. A tort is a wrong to any legal right, and by legal right is meant a personal or property right possessed by any one which the law recognizes and protects. Torts, therefore, cover wrongs done throughout the realm of legal rights, be they rights of persons, and therein of the absolute rights of individuals, of the relative rights of master and servant, of husband and wife, parent and child, guardian and ward, and the rights in things, be it a tort to personal property or to real property. It is therefore impossible to make any accurate division and classification of torts, for wherever the law recognizes a legal right, it also protects against and redresses the legal wrong.

2. **A tort must be distinguished from a crime,** for though both are wrongful acts, a tort is a wrong done to the right of a private individual and a crime is a wrong done to the public at large. One element of distinction between a tort and a crime is that, in a crime the person guilty of it must have had the evil intent to commit the crime, but that in many torts intent is not necessary. It must also be remarked that frequently the same act is both a tort and a crime, as for instance in the case of an assault and battery, the person guilty of the assault and battery has committed a crime against the law of the State, but he has likewise been guilty of a tort, in that he has violated the right of personal security which the law recognizes, in the person who was assaulted.

3. **A tort strictly never arises out of a contract,** but frequently torts are waived and redress is sought for the tort on the theory of an implied contract. As, for instance, where

a man wrongfully appropriates the property of another; this is a tort, but the person whose property has been appropriated may by fiction of law treat the appropriation of the property as an implied promise to pay for the same.

4. The elements of a tort are a wrongful act and damage resulting therefrom, or as is frequently termed the wrongful act or *injuria* and damage or *damnum*. These two elements must concur. If injury should result from the act of any person which was not a wrongful act, then it is termed a *damnum absque injuria* or an accident, and this is no tort, so if there be a wrongful act but no resulting damage, not even nominal damage, this also is no tort.

5. All persons may be liable for torts. A person may be guilty of a tort, though incapable of making a contract; so it is held that infants, lunatics, and married women and drunkards are liable for torts which they commit, but it must be distinctly understood that the degree and scope of their liability is not the same in all cases as if they were adults and under no liability. Infants are not liable for torts which embrace an intention, as for instance in the case of libel and slander where a malicious intent must be shown, the infant is not liable for a slander or a libel unless it be shown that he is of sufficient age to have the malicious intent. Before an infant may be held for a tort wherein an intent is an essential element, proof must not only be made of the wrongful act, but that the infant is old enough to harbor an intent. So also there are torts growing out of contracts, as, for example, the tort of wrongfully converting bailed property, and generally speaking an infant is not liable for torts which arise out of contracts.

Again, in those cases where the law allows not only compensatory damages, but punitive damages as well, for the commission of a tort. If the tort-feasor be an infant, no punitive damages will be allowed unless it be shown that the infant was old enough to justify punitive as well as compensatory damages.

So also lunatics are not liable for wrongs where malice or evil intent is a necessary element, nor are they liable for more than compensatory damages.

Married Women. — Under the modern enabling acts whereby married women have power to contract and control their own property, it may be said that a married woman is liable as any adult for torts committed in connection with her separate property. Before the passage of these acts it was held that a married woman having no power to contract could not be liable for torts indirectly growing out of contracts which she might have made. As for other torts, she was liable for them, but under the common law, the action must be brought against her jointly with her husband. However, the old common law doctrine, that if a wrong was committed by a wife in the presence of her husband, the presumption must be entertained that it was done under his influence, and consequently was his tort rather than that of the wife's, was a part of the law of torts, and if the tort was so committed, he alone and not the wife was liable.

Corporations being artificial bodies, act through their agents and officers, and a corporation is liable for any tort committed by an officer or servant while acting in the scope of his duties in the furtherance of the corporate purposes.

A tort may be the act of one person or it may be the act of several persons. Some torts, however, are in law regarded as individual torts, or as possible of commission by one individual alone, as in the case of a libel or a slander. Each individual who repeats the slander or publishes the libel is guilty of a separate and unconnected tort; so also there are torts which are capable of commission only by several tort-feasors, as in the case of a conspiracy, which of necessity requires two or more persons. Joint tort-feasors may be sued collectively or individually, and a judgment gotten against one individually is no bar to an action against the others unless the prior judgment is satisfied, in which case plaintiff can recover costs merely against the others. There can be no apportionment of damages between joint tort-feasors, for the reason that the law does not attempt to measure the degree of guilt between them. Each one is liable for the entire damage inflicted. So also there is no contribution between joint wrong-doers.

6. Blackstone in his third book treats of the law of torts and describes them to be the infringement or privation of the private or civil rights belonging to individuals considered as individuals, and therefore terms them civil injuries, and these injuries may be redressed by the mere act of the parties themselves or by the mere act and operation of law and by suits in court, which last is a conjunction of the act of the parties co-operating with the act of the law. As to redress of private wrongs obtained by the mere act of the parties themselves, the general rule is that if the person can obtain redress peaceably by his own act, as in the case of the abatement of a nuisance, he may do so, but if he is resisted by the tort-feasor he must go to court. In the case of the abatement of a nuisance, a reasonable notice of the intention to abate and a reasonable time should be allowed to the tort-feasor to remove the nuisance. There are some few instances where the nature of an injury will not admit of a notice; moreover, the person intending to abate the nuisance must inflict as little injury as possible, so if the tort be that of attacking one in his person or property, it is proper to repel force by force, but this is limited only to a defense of one's self, and of those who stand in the relation of husband and wife, parent and child and master and servant, guardian and ward. In such cases the defense must be limited to what is necessary to make a defense, and the person injured must seek further redress by an action of law; so one who has been deprived of his property in goods, or whose wife, child or servant is taken away from him, may lawfully claim and retake them if he can do so without a breach of peace. This is called recaption or reprisal, and a similar remedy is given for the recovery of land, where the person deprived of his land may make an entry on the same, if he can do so peaceably. In all cases where the person injured seeks redress for the tort through his own act, the redress must be confined merely to such as is necessary to prevent further injury and recover the property which he has lost, but he must get his damages by an action in court.

7. No person may recover for an injury sustained while en-

gaged in a wrongful act, if the wrongful act aided in producing the damage, nor can one recover for an injury resulting from a wrongful act if he consents to the wrongful act, as the Latin maxim puts it, *volenti non fit injuria*.

8. Blackstone classifies those legal rights, the infringement of which creates a tort, into the rights of persons and the rights of property; the rights of persons he subdivides into absolute and relative, absolute rights being such as appertain and belong to private men considered as individuals, and relative rights, such as are incident to them as members of society. Absolute rights are the right of personal property, of personal liberty and the right of private property. The torts against the limb or body of an individual are committed first by threats and menaces of bodily hurt, and second by assault, which is an attempt or offer to beat another without touching him. Third, by battery, which is the unlawful beating of another, and consists in the touching of another's person willfully, no matter how slight the touch, for the law draws no difference between different degrees of violence. Other forms of torts of this character are wounding, which is only an aggravated species of battery, and mayhem, which is an injury that deprives another of the use of a member proper for his defense in fight. Intent is a necessary element in an action for assault. As to torts affecting a man's reputation or good name, the first class is slander, which consists in the publication by one person of malicious, scandalous and slanderous words tending to the damage and hurt of another. By publication is meant the communicating of the slander to some other person than the party defamed. It is no slander to repeat the slander to the person slandered. Another class of tort of this character is libel, which differs from slander, in that it is like injury produced by writing, printing or pictures, etc., which go to the damage or injury of the reputation of another person. As in the case of slander, so in libel, the libel must be published, that is communicated to some other person than the party defamed. The libel and slander must be malicious, that is the statements must not

only be false, but must have been maliciously made, and malice in contemplation of law means any unlawful act done without just cause or excuse. Any false statement or publication derogatory to a man's reputation is presumptively *prima facie* made maliciously. Another essential element of libel and slander is damage. That is, the slanderous or libelous statement must not only have been false and malicious, but it must have resulted in damage to the injured party, and by damage is meant pecuniary injury. Damage, however, is presumed to exist in certain cases where the character of the slander and libel must of necessity result in pecuniary injury, and this is in the case where the libel and slander are made libel and slander *per se*. Words libelous and slanderous *per se* are first, those charging a person with having committed an indictable crime; second, those charging a person with suffering with an infectious disease; third, words charging a person with being incompetent in his business; fourth, those defamatory words falsely spoken of the person, which prejudice him in his profession or trade. In all other cases in an action, pecuniary damage must be proven. In the four classes of cases mentioned, pecuniary damage is presumed. Truth is a defense, and it matters not if the person speaking the defamatory words speak them maliciously, if they were true, it is a defense. The constitutional provisions which insure liberty of press are in no way a defense to a libel published in papers. Liberty of the press means freedom to publish what one wishes unrestricted by censorship but subject to all liability for the publication of false and defamatory matters. There are some cases of privileged persons who are exempt from a suit for libel or slander, as in the case of a witness testifying on the stand, a member of a legislature, or a judge making statements in the course of their official duties. So also the law recognizes that people in official positions are subject to criticism and comment. So long as such criticism and comment is fair, even though it be not correct, the person making them is not liable on an action for libel or slander, but where the criticism and comment takes the form of specific charges against the official, and

those charges be false and maliciously made, and result in damage, the person making them is liable for a libel or slander.

9. **Torts in violation of personal liberty.** This is effected by the injury of false imprisonment and consists in: first, the detention of a person, and second, the unlawfulness of such detention. Any confinement of a person, whether it be in jail, in a private house, or even by detaining him in the public street, is a detention, and if unlawful, is false imprisonment. It is not necessary to prove damage in such a case, for the law presumes damages. To justify an imprisonment it must be shown that the person was detained through some legal right, so a parent may restrain a child in a reasonable way, the guardian his ward, and teacher his pupil, and in some instances, the husband his wife. So also insane people may be restrained after a proper finding of insanity. A private individual may arrest without a warrant, a person whom he has reasonable ground to suspect is guilty of a felony which has actually been committed, or a person who is in the act of committing the felony. A peace officer may arrest without a warrant, where he has reasonable ground to suspect that a felony has been committed, and the person arrested has committed it, even though he is mistaken in his belief that a felony has been committed. Where an arrest is made under process, the warrant must show on its face that it has been issued by the proper officials and has no mistake apparent on its face. An officer serving such a process is protected, for he need not go behind the warrant. Another tort of like nature to the tort of false imprisonment is that of malicious prosecution, which consists in the bringing of a criminal action against a person without probable cause, and with malice, and the action has terminated in the favor of the accused. It must be noted, however, that this tort consists rather in the damage to reputation than the damage to the right of personal liberty. It must be shown that the accuser acted with malice, which means any improper motive. The accuser may justify the prosecution by proving that he brought the suit with prob-

able cause. If before instituting the prosecution he consults with an attorney and presented the full facts to this attorney, and the attorney advises him to bring the proceedings, this is a showing of probable cause. Malicious prosecution may exist in certain civil actions as well as in criminal cases, as in maliciously bringing an action in bankruptcy or attempting to have a person declared insane or in a malicious attachment. In all such cases, the person proceeded against is injured in reputation or in property. A plaintiff in a suit for malicious prosecution must also prove that he has suffered pecuniary damage.

10. The torts which affect one in his relative rights as incident to his membership of society, arise in the relationship of husband and wife, parent and child, guardian and ward and master and servant. In the relation of husband and wife, the husband may sue for torts growing out of the abduction of his wife, improper relations with his wife, and for the physical injury suffered by his wife. In all such actions the theory of the action is that the husband has lost the services of his wife either permanently or temporarily. By services is not meant manual service, but the society, comfort and assistance the wife rendered the husband. At common law the wife had no reciprocal action in such cases as the husband. Under modern statutes she has. The torts which affect the relation of parent and child, consist in anything which injures the right of the parent to the services of the child. A parent in point of law is entitled to the society, comfort and assistance of the child until he becomes an adult, and anything which lessens or destroys such services is a tort.

At common law there was no liability for causing the death of the person. A husband or a parent might recover for the loss of services between the time of injury and the death, and for the expenses occasioned by the injury, up to the time of death. By Lord Campbell's act, which has been uniformly adopted throughout the United States, an action may be brought by the legal representatives of the deceased, in every case where the deceased might have brought an action had

not death resulted. The spirit of this law is to provide for those dependent upon the deceased.

Torts growing out of injury to the relation of guardian and ward, have almost disappeared with the disappearance of the common law rights that the guardian once possessed over his ward.

Any injury whereby a servant is rendered incapable of rendering services to his master, may be made the subject for an action for torts.

A master is liable to other persons for the acts of his servants while in his service, but he is not liable for what the servant does without the scope of the master's business. Not every person doing work for another is that person's servant. He may be an independent contractor. If the employer so supervises the work of his employe that he is at all times under his general control and management, subject to his orders, then that person is a servant. Where, however, the person employed can do the work after his own fashion and the employer looks only to the result, that person is an independent contractor, and the employer is not liable for the independent contractor's acts, unless he knew or ought to have known that the independent contractor was incompetent or unless he interferes and participates in the work of the independent contractor.

11. Another class of torts arises, akin to the torts which arise out of the relationship of members in society, which may be termed torts in confidential relations, that is where a relationship exists between two people, wherein one of them intrusts his pecuniary interests to another. This is peculiarly the case where by reason of age or relationship, the person in whom the pecuniary interests are intrusted may be said to have a superior position to the person intrusting them, as in the case of guardian and ward and parent and child, directors of a corporation and the stockholders, or an agent or trustee dealing with the funds of another, or an attorney and client. In all such cases the guardian, the parent, corporation directors, the trustee and the attorney are held to a strict account-

ability for their acts, and any advantage which they may take by reason of the trust reposed in them or the influence which they are presumed to have over the subordinate person in relationship, shall be strictly examined into, and if by fraud, deception or undue influence they have obtained any unfair advantage, this will be held to be a tort, and they are liable to account for the results of their unfair action.

Akin to such torts are the torts arising out of the neglect of official duty. A broad distinction is recognized in such cases between ministerial duties and discretionary duties. Where the law imposes upon an official a duty involving no discretion, but mandatory upon him to perform, and he neglects and declines to perform that duty upon proper request, such official is liable to any individual who is injured by a failure to perform it. Where, however, the duty is one which involves a discretion and decision by the officer whether under the circumstances the act requested should or should not be done, the officer is not liable to an individual for failure to perform the same. So also in the cases of courts a similar distinction arises between courts of general jurisdiction and a court of limited jurisdiction. No court of limited jurisdiction is liable for an act done within its jurisdiction, no matter if it be done corruptly. The court is, however, liable for an act done without its jurisdiction. If, however, the court is a court of general jurisdiction, it is not liable for any act done, even though done corruptly.

12. **Torts done in respect to personal property.**—Injuries to personal property are accomplished first by force directly applied, for which the action of trespass is brought; second, by force indirectly applied for which the action of trespass on the case is brought, and third, by a refusal to redeliver property, for which the action of conversion is brought. Trespass consists in the wrongful taking of one's property against his consent. Any one entitled to the immediate possession of property may bring the action of trespass, even though he has not the general ownership. Intent is not an element in the action of trespass. Conversion is the

wrongful exercise of dominion over another's property. Conversion differs from trespass, for the tort-feasor in conversion originally acquired possession rightfully, but continues to maintain that possession after a time when his rightful possession has vanished. Where possession of the property has been rightfully acquired by defendant, as in the case of an action of conversion, there must first be a demand made on him to deliver, but if it was wrongfully acquired *ab initio*, no demand is necessary. Tenants in common have an equal right to the possession of personal property, and the possession by one is presumed to be the possession of all, but one tenant in common may by acts evidencing a hostile intention to the others, be guilty of a conversion. An officer taking property under an execution or in an attachment suit is not guilty of conversion if he acts under a process of court which is fair on its face. Where a person either wrongfully appropriates personal property *ab initio*, or retains it in his possession after his right of possession has vanished, the owner or the one entitled to the immediate possession of the same may bring an action in replevin to recover the identical property, or he may treat the wrongful appropriation of the same by fiction of law as an implied promise to pay the value of same, and recover of the person the value of the property thus wrongfully appropriated. Another form of tort exists wherein the tort consists not only in the taking away from the owner of his property, but in the injury to it while in his possession. In such a case the plaintiff is entitled to recover for the injury he has sustained.

13. **Torts arising through frauds.**—A fraud is an advantage obtained over another by the use of deception, and it may consist in either actual fraud or constructive fraud. In actual fraud the following facts must exist: A false representation as to a material fact made by one knowing that it was false and believed to be true by the person to whom the representation was made, whereby he was induced to act upon the representation, and injured by reason of it. Fraud always involves an intention. The person guilty of a fraud must have intended by the deceit to obtain the unfair advan-

tage. Fraud need not consist in words. It may consist in silence, where there was a duty upon the party remaining silent to speak. If, however, the person to whom the representations were made, knew that the representations were false, no case of fraud exists because he did not rely upon the representations, but if the persons making the false representations did not know they were false, he is none the less liable if he made the statements as of his own knowledge, or if he made the statement without any reasonable ground to believe that his statements were true. Representations of future facts do not constitute a fraud, even though false. Where a person has been induced to make a contract through fraud, he may either rescind the contract if it be an executory one, or if it be an executed one, he may rescind it by returning what he has received under it, if the thing has any substantial value, or he may adopt the contract and bring an action for damages based upon the deceit, the measure of damages being the difference between what he would have gotten but for the deceit, and what he actually got. Constructive fraud is fraud which the law implies in those confidential relations which we have heretofore mentioned, and grows out of some undue advantage taken by one in whom the other party by reason of their peculiar relationship places trust and confidence. The law is jealous to protect the confidence thus reposed, and treats as a fraud anything which savors as a hardship on the one who has imposed the trust and confidence.

14. **Definition.** — Actionable negligence is the failure on the part of one person to exercise that degree of care and thoughtfulness in his conduct toward another which the law requires whereby the other person sustains legal damage.

15. **Discussion of Negligence.** — The law recognizes certain standards of conduct owed by people to each other with respect to the duty of avoiding injury to each other. Given a case where one person has by careless or thoughtless act injured another, the law inquires what would the ordinarily prudent man in similar circumstances have done, and if the conduct of the person causing the injury was more careless

and thoughtless, than what would have been the conduct of the ordinarily prudent man in the same circumstance, the law says this is negligence for which the injured person may recover, provided he has sustained legal damage as a result of the negligence.

16. **Elements of actionable negligence** are first a legal duty of all persons in their conduct toward others to use that degree of care which the average prudent man would use in the same circumstance, second, a failure on the part of the person charged with negligence to use that degree of care, and third, an injury directly and proximately resulting from the failure to exercise that degree to the person charging the negligence.

17. **Proximate Cause.** — No case of negligence can be made successfully unless the plaintiff may show that he has sustained legal damage which resulted directly and naturally from the defendant's failure to exercise the proper degree of care. One test generally applied to determine whether the particular act of negligence was the proximate cause of the damage is whether or not it could have been foreseen and anticipated that the particular act of negligence would have produced the damage alleged — if so the negligent act was the proximate cause of the damage.

18. **Standard of Care Required.** — The law recognizes that in the conduct of persons toward each other people owe care and thoughtfulness to avoid injuring each other, but great confusion exists in fixing by what standard this duty of care and thoughtfulness must be measured. It is not sufficient to say it must be such a degree of care that an ordinarily prudent man would exercise in similar circumstances, for in the case of negligence charged against a doctor for unskillful treatment his duty of care is not to be measured by what the ordinarily prudent layman would have done in a similar case but by what the ordinarily prudent doctor would have done in similar circumstances. So again the law itself places a duty on persons following certain employments to exercise extraordinary care, e. g., common carriers, and here when negligence is charged against a common carrier the question

must be first determined by recognizing that a common carrier owes the highest exercise of care and then determining what a prudent carrier, who owes the highest degree of care, would do in similar conditions. The ultimate analysis of care and thoughtfulness required is first those cases wherein a person need exercise only slight care as in the case of the duty of the owner of land toward trespassers ; second wherein a person must exercise average care as in the case of one driving on the street to one crossing it on foot ; third, wherein a person must exercise the highest degree of care as in the case of railroad company to its passenger. Given a case of negligence it is first necessary to determine which one of these degrees of care was owed if at all to the person injured by the person charged with the negligence and then to determine whether, in the particular case the defendant exercised that degree of care which an ordinarily prudent person in similar position upon whom the law puts the duty to exercise the same degree of care would have exercised.

19. **Contributory Negligence.**— On the theory that a man is liable for the consequences of his own act if the plaintiff's own act either wholly or partially caused the damage he cannot recover of the defendant, for if he wholly caused it the defendant is not guilty at all of negligence ; if he partially caused it, his act has contributed to the causes resulting in the damage. This is called contributory negligence. But to be contributory negligence the plaintiff's act must be the proximate cause or one of the proximate causes of the damage. Formerly a rule prevailed in some jurisdictions in the case where both plaintiff and defendant were negligent, called the rule of comparative negligence, wherein if it appeared that the plaintiff's negligence was only slight and the defendant's gross, plaintiff could recover of defendant. The rule of comparative negligence is no longer used. But in cases where plaintiff and defendant are both negligent, the defendant is none the less liable if his negligence is subsequent in point of time, as in the case of *Davis v. Mann*, where plaintiff negligently left his donkey in the street and later the defendant, in driving reck-

lessly down the street, ran over the donkey. Out of this line of decisions has grown the so-called humanitarian doctrine applied chiefly in railroad damage suits that even if plaintiff may negligently put himself in a position of danger still if the defendant did discover plaintiff in that position of danger or might have discovered him in time to avoid the accident then defendant is none the less liable.

It is not contributory negligence on the part of plaintiff if without his fault and because of another's negligence he finds himself in a position of peril and acting under excitement or mistaken ideas he fails to do that which might extricate him from his peril. In such a case plaintiff may recover of defendant.

A child is not guilty of contributory negligence unless he is old enough to understand the probable results of the act charged as contributory negligence. Under fourteen a child is not supposed to have sufficient discretion to judge of the probable results of his acts; when over fourteen it is a question to be decided by the jury whether he must be charged with contributory negligence.

In some jurisdictions when a child under the years of discretion is injured by the negligent act of another but the injury would not have happened but for the negligence of his parent, guardian or custodian the negligence of the latter is imputed to the child and the child may not recover. As for example a child through its mother's carelessness escapes from the yard and while on the street where he had no right to be and is injured by the careless driving of another person. Here the mother's negligence is imputed to the child. This doctrine of imputed negligence has never been adopted in the majority of States and is perhaps losing hold where it was originally adopted.

20. Nuisances. — Blackstone defines a nuisance to anything that worketh hurt, inconvenience or damage. This definition though not satisfactory is sufficient, as the term is incapable of any exact definition. A nuisance generally exists where a person so uses his property, be it real or personal, that it

causes hurt, inconvenience or damage to others which the law recognizes and redresses, or where by his acts or conduct, one person works a hurt, inconvenience or damage to another in his use of his property. No classification of nuisances is possible because of the infinite number of ways a nuisance may exist.

21. **Nuisances are public or private.** Public when the hurt or inconvenience affects the entire community, private when they affect only one or more individuals. The same nuisance may be both public and private. Public because of the annoyance to the community at large, and private because of some especial annoyance, other than that suffered by the community, worked on one or more individuals.

22. **Nuisances per se.** — Some nuisances are nuisances per se which are nuisances made so by the common law and declared to be such by a statute, and this because there can be no question whether the annoyance is a nuisance, as for example the use of premises for immoral purposes. There are other instances which may or may not be a nuisance as in the case of slaughter-houses, which, if located in a populous district, would be a nuisance, but if not so located would not be.

23. **Elements of a Nuisance.** — In a nuisance there must be a wrongful act and damage following directly therefrom. No intent is necessary to make a nuisance. The wrongful act may be in doing something wrongfully or the wrongful omission to do something. The damage must be something which the law regards as legal damage, mere annoyance or disquietude is insufficient.

24. **Locality as Determining a Nuisance.** — There are many occupations lawful in themselves which of their very nature cause inconvenience and injury in their conduct to persons living in their vicinity because of dust, noise, odors or intrinsic danger. These may or may not be nuisances, dependent on the particular circumstances. The law recognizes that society requires mutual concessions of people living in close community, and merely because a manufacturing concern, etc., causes inconvenience to the people in its vicinity is no

ground for declaring it a nuisance. But if the inconvenience goes to the degree of injury to property or health, as for instance depreciation in value of the land or general sickness, or danger of sickness, then inconvenience grows to a degree which the law regards as a legal damage and will treat as a nuisance. It makes no difference that the manufactory was first on the ground and the persons came later knowing the situation, the law will not permit a neighborhood to be permanently injured by a nuisance, and will entertain the complaint of the persons coming later. There is no possible classification of nuisances for they arise from any illegal use of real or personal property, or even from mere conduct of a person whereby another suffers legal damage.

THE LAW OF ADMINISTRATION.

ANALYSIS.

1. Law of administration.
2. Who may make a will.
3. Form of will.
4. Holographic and nuncupative wills and codicils.
5. Revocation of wills.
6. Gifts causa mortis.
7. Construction of wills.
8. Legacies.
9. Descent and distribution of property of intestates.
10. Dower and curtesy.
11. Probate courts — Administrator — Executor.
12. Purpose of administration.
13. Manner of administration.

THE LAW OF ADMINISTRATION.

1. Upon the death of a person owning property, his property will pass either by law to his heirs, or, if he left a will, by will to the persons therein designated and the law relative to the passing of property upon the owner's death is termed the law of administration.

2. Who may make a will. All persons having capacity to contract have capacity to make a will; so infants may make no will until they arrive at majority, unless the statute gives them capacity when they arrive at a certain age, which is the case in several States. Under the common law a married woman may make no will, but the modern Married Women's Acts permit her to make a will as to her sole and separate property. A person making a will must be of sound mind. For this reason idiots who are supposed to be wholly without mental faculty can make no will; but people who are temporarily insane may make a good will if it is made at a time when they are not insane, and people of weak mental faculties may make a will if the disorder or weakness of their mental condition is not of a character to deprive them of reason. Presumptively all persons possess the mental capacity to make a will, and the burden rests upon him who seeks to overthrow the will to show the lack of capacity. The usual test of mental capacity is whether or not the testator at the time of making his will, understood that he was making a will and possessed clear enough reasoning power to recollect the general value and extent of his property and the persons who would or ought to be remembered in his will. Where a testator is induced to make his will by threats or force of intimidation, or by fraud, the will may be set aside, as it is not an expression of his intentions; so, also, a testator may be induced to make his will through undue influence, and by undue influence is meant such a degree of persuasion as leads

the testator to dispose of his property contrary to what would naturally be his desires. Mere appeals to the testator's good nature, and solicitations on the part of his relatives, or flattery, is not undue influence, but if the testator has been moved by false arguments or has been beset by harassing importunities to such an extent that he makes a will contrary to what may be determined his intention but for such arguments and importunities, the will may be set aside.

3. No particular form of will is necessary. The testator may express himself in any manner he chooses, but it must be apparent that he intended the writing to be his will, and he must sign it or make his mark to it. In order to avoid fraud it is universally required that the will be attested by subscribing witnesses. By attestation is meant that the testator having prepared his will, shall sign it in the presence of some witnesses, or shall show his signature to some witnesses and declare it to be his signature and that the instrument to which his signature is appended is his will, and request the witnesses to sign the same in his presence as attesting witnesses. Persons made beneficiaries under the will are not competent as attesting witnesses, except they are heirs who would take under the law if there was no will.

4. Where a will is written wholly by the testator it is said to be a holographic will, and in some jurisdictions a holographic will is admitted to probate without the usual formality of attestation. A nuncupative will is a will not reduced to writing by the testator, but one whereby the testator orally declares the disposition of his property in the presence of witnesses. These wills only apply to personal property. In some jurisdictions the validity of such wills is wholly denied, and in others it is recognized only in cases of small estates.

A codicil is an addition made by a testator to a will which he has already signed and had attested. A codicil must be signed and attested in the same manner as the will.

5. A will once executed by the testator remains his will until he evidences some intent to revoke it. This may be done by the making of a new will, or it may be done by his treating

the old one in such a way as his intention to revoke it becomes evident, either by cancelling it or destroying it. At common law the marriage of a feme sole revoked her will, but the marriage of a testator without birth of children had no effect, but this has been variously modified by statute in the different States:

6. Another form of disposition of personal property is a **gift mortis causa**, wherein a person believing himself about to die gives his property over to another and makes some delivery of the same, then the personal property so given becomes the property of the donee provided the donor dies.

7. In construing a will the prevailing rule is to determine what was the intent of the testator. To effect this words in the will may be supplied or interposed or eliminated, providing the testator's intent may be thus effected. A will speaks only from the time of the death of the testator, and takes effect only from that time, and a will applies only as to property held and owned by the testator at the time of his death.

8. **Devises or legacies** are special gifts made in the will to particular persons, a devise being a gift of real estate, a legacy being a gift of personal estate. If the devisee or legatee die before the testator, then the devise or legacy is said to lapse and the property thus bequeathed or devised goes back into the general body of the estate. Legacies are said to be **specific or general**, according to their character. If it be a gift of specific articles, then it is said to be a specific legacy because the gift is distinguishable by the words used from the balance of the estate, but if the legacy be not a bequest of any particular or specific thing, as, for instance, a bequest of a number of things out of a larger number which the estate possesses, then it is a general bequest. General legacies are held to abate before specific legacies, as, for example, if the testator die leaving ten horses and he makes a specific legacy of five of those horses by name to one legatee, and the general bequest that he leaves ten horses to another legatee, then the specific legatee will receive the five horses given to him, but the general legatee merely gets the balance of the horses.

Another class of legacies is known as demonstrative legacies, which partake both in the nature of general and specific legacies.

9. The law makes provision for the descent and distribution of property of one dying in case he leaves no will. The usual mode of descent and distribution under the law is, first, to the children or their descendants in equal shares; second, if there be no children or their descendants, then to the father, mother, brothers and sisters and their descendants in equal shares; third, if neither of the two first mentioned classes exist, then to the husband or wife, and if there be no husband or wife, then to the grandfathers, grandmothers, uncles and aunts; fourth, if none of these classes exist, then to the great-grandfathers, great-grandmothers and their descendants, in equal parts. Where property descends and is distributed by law, it should be remembered that the personal property descends and is distributed according to the law of the decedent's domicile, but the real property descends and is distributed according to the law of the jurisdiction wherein the property is. In determining the method of distribution when distribution is made according to law, it will be seen that the property first descends to the children or their descendants, in equal shares. If all of his children are living at the time of the decedent's death, each will take his share *per capita* but should some of his children be dead, leaving descendants, then those of the children living take *per capita*, and the children of those dead take *per stirpes* or by representation the share which their deceased parent would have taken.

10. It will be observed that where the law makes provision for descent and distribution, the husband or wife is an heir only in the cases where there are no children, nor father, mother, brothers or sisters or their descendants, and this is for the reason that the law has made other provision for the surviving husband or wife: in the case of the husband, his right of curtesy; in the case of the wife, her right of dower, and as to curtesy and dower reference is made in the discussion

of these subjects under the head of Real Property. If there be no heirs whatsoever, the property of the decedent will escheat to the State.

11. The administration of the estate of a deceased person is left generally to courts which are termed Probate Courts, which control the handling of the estate from the time of the death of the decedent until it be distributed, either to the persons named in the will, or to those made heirs by the law. For the purpose of administering the estate during this period, two classes of agents are provided, first, the agent may be named by the testator in his will, in which case the agent is called an executor if he be a man, and an executrix if she be a woman. If no person is named in the will, or the decedent dies intestate, then some one is appointed by the court and he is called an administrator, or, if she be a woman, an administratrix. During the period of administration the title to all the personal property of the decedent vests in the executor or administrator. The title to the real estate, however, will vest immediately in the persons named in the will as devisees, or in the heirs, unless the will expressly provides that the executors shall take charge of the real estate. This is because the real estate is supposed to go direct to the devisees or heirs without the intervention of any administration. If, however, the personal estate of the decedent be insolvent, then the Probate Court may direct the executor or administrator to take charge of the real estate and sell the same to pay the debts of the decedent.

12. Upon the death of the person leaving property, the law aims at two things, first, that out of the property so left the debts of the decedent shall be paid, and after they have been paid, second, the balance of the estate shall go under the will or under the law to the legatees, who are persons named in the will to whom personal property is bequeathed, or to the devisees, who are persons named in the will to whom real property is devised, or to the heirs of the deceased in case no will is made.

13. For the faithful administration of the estate the execu-

tor or administrator is usually required to furnish bond. Upon doing so he is duly qualified to take charge of the estate, and it becomes his duty to inventory all of the property of the estate and to have the same valued. To them are presented the claims of various creditors of the deceased, these claims are heard by the court, and are allowed or disallowed according to the justness of them, and if allowed are paid by the administrator or executor under order of court. Certain characters of claims have priority, so the funeral expenses, expenses of the last sickness, wages of servants, and taxes are to be paid in full out of the assets of the estate in priority to other claims, and if the estate be insolvent, these claims do not abate pro rata but are paid in full, and the other claims abate pro rata. Claims must be presented within a certain time, variously fixed by the law, and if not so presented are held to be barred under a special statute of limitations.

ABRIDGMENT
OF
EQUITY JURISPRUDENCE.

AS STATED IN THE STANDARD WORK OF STORY ON EQUITY JURISPRUDENCE AND TAKEN THEREFROM BY PERMISSION OF THE OWNER, TO WHICH IS ADDED MANY APT NOTES AND ILLUSTRATIONS. THE REFERENCES ARE TO SECTIONS OF ORIGINAL WORK.

ANALYSIS.

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EQUITY.

NATURE AND CHARACTER OF EQUITY JURISPRUDENCE.

EQUITY, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is made by it. (Sec. 6.)

Aristotle has defined the very nature of equity to be, the correction of the law wherein it is defective by reason of its universality. (Sec. 8.)

Equity jurisprudence may properly be said to be that portion of remedial justice which is exclusively administered by a court of equity, as is contradistinguished from that portion of remedial which is exclusively administered by a court of common law. (Sec. 25.)

In the most general sense we are accustomed to call that equity which, in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex æquo et bono*. In this sense it answers precisely to the definition of justice, or natural law, as given by Justinian in the Pandects. (Sec. 1.)

Taken broadly and philosophically, equity means to do to all men as we would they should do unto us.

This is natural equity, which, being derived from the principles of universal truth and justice, prescribes piety and reverence towards God, the maker and disposer of us all, honesty and benevolence to one another — by doing good and eschewing evil.

It is clear that human tribunals cannot cope with so wide a range of duties as natural equity comprehends. Taken in a less universal sense, equity is used in contradistinction to strict law. This is moral equity, which should be the genius of every kind of human jurisdiction, since it expounds and limits the language of the positive laws, and construes them,

not according to their strict letter, but rather in their reasonable and benignant spirit.

But it is in neither of these senses that equity is to be understood as the substantial justice which is expounded by our courts of chancery. It is here accepted in a more limited and technical sense, and may be called municipal equity, and described as the system of supplemental law administered in chancery, and founded upon defined rules, recorded precedents, and established principles — to which it closely adheres.

The grand characteristic of municipal equity is displayed in the nature and extent of its redress.

The essential difference between law and equity principally consists in the different modes of administering justice in each, in the mode of *proof*, the mode of *trial*, and the mode of *relief*.

The system of our courts of equity is a labored, connected system, governed by established rules, and bound down by precedents from which they do not depart, although the reason of some of them may, perhaps, be liable to objection. Sometimes a precedent is so strictly followed that a particular judgment founded upon special circumstances gives rise to a general rule. (Sec. 18.)

Courts of equity adhere as closely to general rules as courts of law. Each expounds its rules to meet new cases, but each is equally reluctant to depart from them upon slight inconveniences and mischiefs.

One of the most common maxims upon which a court of equity daily acts is that equity follows the law, and seeks out and guides itself by the analogies of the law. (Sec. 19.)

Courts of equity decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of these principles. But the principles are as fixed and certain as the principles on which the courts of common law proceed. (Sec. 20.)

One of the most striking and distinctive features of courts of equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas courts of common law are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or for the defendant.

Courts of equity can administer remedies for rights, which rights courts of common law do not recognize at all; or if they do recognize them, they leave them wholly to the conscience and good-will of the parties. Thus, what are technically called trusts—that is, estates vested in persons upon particular trusts and confidences, are wholly without any cognizance at the common law, and the abuses of such trusts and confidences are beyond the reach of any legal process. (Sec. 29.)

The remedies in courts of equity are often very different in their nature, mode, and degree from those of courts of common law, even when each has a jurisdiction over the same subject-matter. Thus, a court of equity, if a contract is broken, will often compel the party specifically to perform the contract; whereas courts of law can only give damages for the breach of it. So, courts of equity will interfere by way of injunction to prevent wrongs; whereas courts of common law can grant redress only when the wrong is done. (Sec. 30.)

The most general, if not the most precise, description of a court of equity is that it has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, when a plain, adequate, and complete remedy cannot be had in the courts of common law. (Sec. 33.)

The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction.

It must be adequate; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity.

It must be complete; that is it must attain the full end and justice of the case. (Sec. 33.)

It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time and in future; otherwise, equity will interfere and give relief. (Sec. 33.)

The jurisdiction of a court of equity is therefore, sometimes concurrent with the jurisdiction of a court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it. (Sec. 33.)

Equity jurisdiction is distributable into three subdivisions, namely: —

(I.) The assistant, being auxiliary to the common law, and under which range matter of —

1. Discovery for the promotion of substantive justice at common law.

2. Preservation of testimony, relating to a question at law, from persons not being the litigants.

3. Removal of improper impediments, and prevention of unconscientious defenses at common law.

4. Giving effect to, and relieving from, the consequences of common law judgments.

(II.) The concurrent with the common law, comprehending —

1. The remedial correction of fraud.

2. The prevention of fraud by injunction.

3. Accident.

4. Mistake.

5. Account.

6. Dower.

7. Interpleader.

8. The delivery up of documents and specific chattels.

9. The specific performance of agreements.

(III.) The exclusive, relating to —

1. Trusts.

2. Infancy.

3. The equitable rights of wives.

4. Legal and equitable mortgages.

5. The assignment of choses in action.
6. Partition.
7. The appointment of receivers.
8. Charities and public trusts.

Equity claims an exclusive jurisdiction in all matters of trust and confidence, and wherever, upon the principles of universal justice the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent.

ORIGIN AND HISTORY.

The present equitable jurisdiction of the courts of chancery seems to have grown up, like most of the other institutions of the English common law, from the exigencies of the times and of judicial administration. (Secs. 41-50.)

Its date may reach back dimly into the earliest times, immediately succeeding the Norman conquest; but the well-defined development of the distinct exercise of equitable jurisdiction, for the most part dates from the time of Edward I.; and its character is but crude and imperfect until the time of Sir Thomas More and Cardinal Wolsey, under Henry VIII.

Lord Nottingham laid the foundation of modern equity jurisprudence, and Lord Hardwicke measurably matured its several departments.

In this country equity jurisprudence has grown up chiefly since the formation of our national government. Both in the national and state courts it follows the model of the English court of chancery, except in some of the states, and in the national tribunals it is administered by the common law courts. In some of the states the equity jurisdiction is very imperfect, and in some it is scarcely known. (Secs. 54-58.)

The office and name of chancellor was known to the courts of the Roman emperors, where it originally seems to have signified a chief scribe, or secretary, who was afterwards

invested with several judicial powers, and a general superintendency over the rest of the officers of the prince.

The equity jurisdiction at present exercised in this country is founded upon, co-extensive with, and, in most respects, conformable to, that of England. It approaches nearer to the latter than the jurisdiction exercised by the courts of common law in America approaches to the common law as administered in England. The common law was not, in many particulars, applicable to the situation of our country when it was first introduced. (Sec. 57.)

In some of the states of the Union distinct courts at equity are established; in others the powers are exercised concurrently with the common law jurisdiction, by the same tribunal being at once a court of law and a court of equity. In others, again, no general equity powers exist; but a few specified heads of equity jurisprudence are confided to the ordinary courts of law, and constitute a limited statutable jurisdiction. (Sec. 58.)

But the *general* features and leading principles of the law of equity are essentially alike *in all the States*, and in all civilized countries.

GENERAL VIEW AND MAXIMS.

Courts of equity are established to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. (Sec. 59.)

Although fraud, accident, and trust are proper objects of courts of equity, it is by no means true that they are exclusively cognizable therein. On the contrary, fraud is, in many cases, cognizable in a court of law.

Many cases of accident are remediable at law, such as losses of deeds, mistakes in accounts and receipts, impossibilities in the strict performance of conditions, and other like cases. (Sec. 60.)

Trusts, though in general of a peculiar and exclusive jurisdiction in equity, are sometimes cognizable at law; as, for instance, cases of bailments, and that larger class of cases where the action for money had and received for another's use is maintained *ex æquo et bono*.

Cases of trusts may exist in which the parties must abide by their own false confidence in others, without any aid from courts of justice. (Sec. 61.)

Thus, as in cases of illegal contracts, or those in which one party has placed property in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the former must abide by his loss, for, *in pari delicto melior est conditio possidentis, et defendentis*, is a maxim of public policy equally respected in courts of law and courts of equity.

It is a common maxim that equity follows the law, *equitas sequitur legem*. This maxim is susceptible of various interpretations. It may mean that equity adopts and follows the rules of law in all cases to which those rules may, in terms, be applicable, or it may mean that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law. (Sec. 64.)

The maxim is true in both of these senses, as applied to different cases and different circumstances.

When a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.

If the law commands or prohibits a thing to be done, equity cannot enjoin the contrary, or dispense with the obligation.

In many cases equity acts by analogy to the rules of law in

relation to equitable titles and estates. Thus, although the statutes of limitation are in their term applicable to courts of law only, yet equity, by analogy, acts upon them, and refuses relief under like circumstances.

Equity always discountenances laches, and holds that laches is presumable in cases where it is positively declared at law.

In general, in courts of equity the same construction and effect are given to perfect or execute trust estates as are given by courts of law to legal estates. The incidents, properties, and consequences of the estates are the same.

In short, the maxim that equity follows the law is a maxim liable to many exceptions, and it cannot be generally affirmed that, when there is no remedy at law in the given case, there is none in equity; or, on the other hand, that equity, in the administration of its own principles, is utterly regardless of the rules of law.

Another maxim is that where there is equal equity the law must prevail.

In such a case the defendant has an equal claim to the protection of a court of equity for his title as the plaintiff has to the assistance of the court to assert his title, and then the court will not interpose on either side—the equities being equal between persons who have been equally innocent and equally diligent.

A maxim of no small extent is that he who seeks equity must do equity.

This maxim principally applies to the party who is seeking relief in the character of a plaintiff in the court.

Another maxim of general use is that equality is equity; or, as it is sometimes expressed, equity delighteth in equality.

It is variously applied, as, for example, to cases of contribution between co-contractors, sureties, and others.

Equity looks upon that as done which ought to have been done, is another maxim in use in our courts of equity. (Sec. 64g.)

The true meaning of this maxim is that equity will

treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been — not as the parties might have executed them.

The most common cases of the application of the rule are under agreements.

All agreements are considered as performed which are made for a valuable consideration in favor of persons entitled to insist upon their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed.

As to the jurisdiction of courts of equity, one rule is, that originally the jurisdiction has properly attached in equity in any case, on account of the supposed defect of remedy at law, that jurisdiction is not changed or obliterated by the courts of law now entertaining jurisdiction in such cases when they formerly rejected it. (Sec. 64i.)

The jurisdiction of equity, like that of law, must be of a permanent and fixed character. There can be no ebb or flow of jurisdiction dependent upon external changes. Being once vested legitimately in the court, it must remain there until the legislature shall abolish or limit it.

The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief. (Sec. 64k.)

The court having acquired cognizance of the suit for the purposes of discovery, will entertain it for the purpose of relief in most cases of fraud, account, accident, and mistake. The ground is stated to be the propriety of preventing a multiplicity of suits.

Where the jurisdiction once attaches for discovery, and the discovery is actually obtained, the court will further entertain the bill for relief if the plaintiff prays it. But this rule is not to be deemed of universal application, for it is laid down in some of our courts that under some circumstances, where the verdict of a jury is necessary to ascer-

tain the extent of the relief, the plaintiff should be left to his action at law after the discovery is obtained. (Sec. 71.)

JURISDICTION IN CASES OF ACCIDENT.

The concurrent jurisdiction of equity has its true origin in one of two sources: either the courts of law, although they have general jurisdiction in the matter, cannot give adequate, specific, and perfect relief; or, under the actual circumstances of the case, they cannot give any relief at all. (Sec. 76.)

The jurisdiction of the court arising from accident, in the general sense, is a very old head in equity, and probably coeval with its existence. (Sec. 79.)

But the term accident is here intended — not merely inevitable casualty, or the act of Providence, or irresistible force, but such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct in the party.

It is not every case of accident which will justify the interposition of a court of equity. The jurisdiction being concurrent, will be maintained only: first, when a court of law cannot grant suitable relief; and secondly, when the party has a conscientious title to relief. Both grounds must concur in the given case; otherwise equity is bound to withhold its aid.

In cases of the loss of sealed instruments, equity will entertain a suit for relief as well as for discovery upon the party making an affidavit of the loss of the instrument, and offering indemnity. (Sec. 83.)

Courts of equity often interfere where the party, from long possession or exercise of a right over property, may fairly be presumed to have had a legal title to it, and yet has lost the legal evidence of it, or is now unable to produce it. (Sec. 87.)

It may be stated generally that where an inequitable loss or injury will otherwise fall upon a party from circumstances beyond his own control, or from his own acts done in entire

good faith, and in the performance of a supposed duty without negligence, courts of equity will interfere to grant him relief. (Sec. 89.)

Courts of equity will also interfere and grant relief where there has been by accident a confusion of the boundaries between two estates. (Sec. 99a.)

There are cases of accident in which no relief will be granted in courts of equity. Thus, in matters of positive contract (for it is different in obligations or duties created by law) it is no ground for the interference of equity that the party has been prevented from fulfilling them by accident, or that he has been in no default, or that he has been prevented by accident from deriving the full benefit of the contract on his own side. (Sec. 99b.)

The reason is that he might have provided for such contingencies by his contract if he had so chosen, and the law will presume an intentional general liability where he has made no exception.

Equity will not afford relief to a party upon the ground of accident where the accident has arisen from his own gross negligence or fault, for in such case the party has no claim to come into a court of justice to ask to be saved from his own culpable misconduct. (Sec. 105.)

No relief will be granted on account of accident where the other party stands upon an equal equity, and is entitled to equal protection. (Sec. 106.)

Upon a general survey of the grounds of equitable jurisdiction in cases of accident, it will be found that they resolve themselves into the following: that the party seeking relief has a clear right which cannot otherwise be enforced in a suitable manner; or that he will be subjected to an unjustifiable loss without any blame or misconduct on his own part; or that he has a superior equity to the party from whom he seeks the relief. (Sec. 109.)

MISTAKE.

We may next consider the jurisdiction of equity as founded on the ground of mistake.

This is sometimes the result of accident in its large sense; but, as contradistinguished from it, it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. (Sec. 110.)

Mistakes are ordinarily divided into two sorts: mistakes in matter of law and mistakes in matter of fact.

As to mistakes in matter of law. — It is a well known maxim that ignorance of law will not furnish an excuse for any person, either for a breach or for an omission of duty; *ignorantia legis neminum excusat*, and this maxim is equally as much respected in equity as in law. (Sec. 111.)

It probably belongs to some of the earliest rudiments of English jurisprudence, and is certainly so old as to have been long laid up among its settled elements.

If, upon the mere ground of ignorance of the law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice from the nature and difficulty of the proper proofs.

The prescription is that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretense that at the time of parting with it he was ignorant of the law acting on his title.

It is accordingly laid down as a general proposition that in courts of equity ignorance of the law shall not affect agreements nor excuse from the legal consequences of particular acts.

Equity may compel parties to execute their agreements,

but it has no authority to make agreements for them or to substitute one for another. (Sec. 115.)

The general rule is that a mistake of the law is not a ground for reforming a deed, founded on such a mistake. (Sec. 116.)

Courts of equity will not grant relief sought upon the sole ground of mistake of law; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character. (Sec. 116.)

In contemplation of law, all its rules and principles are deemed certain, although they have not as yet been recognized by public adjudications. This doctrine proceeds upon the theoretical ground that *id certum est, quod certum reddi potest*; and that decisions do not make the law, but only promulgate it. (Sec. 126.)

There is ground for a distinction between cases where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases where there is a doubt in controversy, or litigation between the parties as to their respective rights. In the former cases the party seems to labor, in some sort, under a mistake of fact as well as of law. He supposes, as a matter of fact, that he has no title to the property. He does not intend to surrender or release his title, but the act or agreement proceeds upon the supposition that he has none. (Sec. 130.)

But the distinction between mistakes of law and of fact, so far as equitable relief is concerned, is one of policy rather than of principle.

As to compromises, it is said if they are otherwise unobjectionable they will be binding, and the right will not prevail against the agreement of the parties; for the right must always be on one side or other, and there would be an end of compromises if they might be overthrown upon any subsequent ascertainment of rights contrary thereto. (Sec. 131.)

Where compromises are fairly entered into, where

the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent investigation and result. But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance be of a matter of fact or of law.

Cases of surprise mixed up with a mistake of law, stand upon a ground peculiar to themselves, and independent of the general doctrine. In such cases the agreements or acts are unadvised and improvident, and without deliberation, and are held invalid upon the common principle, adopted by courts of equity, to protect those who are unable to protect themselves, and of whom an undue advantage is taken. (Sec. 134.)

Contracts made in mutual error, under circumstances material to their character and consequences, seem upon general principles, invalid.

There are few contradictions of, or exceptions to, the general rule that ignorance of the law, with a full knowledge of the facts, furnishes no ground to rescind agreements, or to set aside solemn acts of the parties. Ignorance of the law will not avail; innocent mistake of fact will. (Sec. 137.)

The general rule governing courts of equity upon this subject should be to deny relief sought upon the mere ground of ignorance or mistake of law; and that the exceptions allowed must be of marked character, both in regard to proof and the degree of injustice consequent upon a denial of relief. (Sec. 138b.)

In relation to contracts it must always be assumed in regard to both of these classes of mistakes, that the parties impliedly stipulate that they will, each for himself, run his own risk. That is the implied condition of all contracts. And the parties cannot properly ask to be relieved from any merely incidental hardship resulting from being under mistake, either as to the true state of the facts or of the law. (Sec. 138h.)

But where the mistake is of so fundamental a character that the minds of the parties have never in fact met, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, equity will interfere, in its discretion, in order to prevent intolerable injustice. (Sec. 188i.)

It must appear that the contract is different from the understanding of both parties to justify the court in reforming it.

As to mistake of fact, the general rule is that an act done, or contract made, under a mistake or ignorance of a material fact, is voidable and relievable in equity. (Sec. 140.)

The ground of this distinction between ignorance of law and ignorance of fact seems to be that, as every man of reasonable understanding is presumed to know the law, and to act upon the rights which it confers or supports when he knows all the facts, it is culpable negligence in him to do an act, or to make a contract, and then to set up his ignorance of law as his defense.

The rule applies not only to cases where there has been a studied suppression or concealment of the facts by the other side, which would amount to a fraud, but also to many cases of innocent ignorance and *mistake on both sides*.

The fact must be material to the act or contract — that is, must be essential to its character, and an efficient cause of its concoction. For though there may be an accidental ignorance or mistake of fact, yet, if the act or contract is not materially affected by it, the party claiming relief will be denied it. (Sec. 141.)

It is not sufficient in all cases to give the party relief that the fact is material; but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. (Sec. 146.)

For if by such reasonable diligence he could have obtained

knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence. Equity gives relief to the vigilant, and not to the negligent.

There must always be shown either the mistake of both parties, or the mistake of one, with the fraudulent concealment of the other, to justify a court of equity in reforming a contract. (Sec. 147.)

It is essential, in order to set aside such a transaction, not only that an advantage should be taken, but it must arise from some obligation in the party to make the discovery — not from an obligation in point of morals only, *but of legal duty*. In such a case the court will not correct the contract merely because a man of nice morals and honor would not have entered into it. It must fall within some definition of fraud or surprise. (Sec. 148.)

The policy of equity is to administer relief to the vigilant, and to put all parties upon the exercise of a searching diligence. Where confidence is reposed, or the party is intentionally misled, relief may be granted; but in such a case there is the ingredient of what the law deems a fraud. (Sec. 148.)

Where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment in regard to all extrinsic circumstances, a like principle applies. (Sec. 149.)

Also where the fact is equally unknown to both parties, or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a court of equity will not interpose, for in such cases the equity is deemed equal between the parties, and, when it is so, a court of equity is passive. (Sec. 150.)

Equity has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that, if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified. (Sec. 153.)

Courts of equity have not hesitated to entertain jurisdic-

tion to reform all contracts where a fraudulent suppression, or omission or insertion of a material stipulation exists, notwithstanding, to some extent, it breaks in upon the uniformity of the rule as to the exclusion of parol evidence to vary or control contracts. (Sec. 154.)

Where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake, equity will relieve. (Sec. 155.)

We must treat the cases in which equity affords relief and allows parol evidence to vary and reform written contracts and instruments upon the ground of accident and mistake, as properly forming, like cases of fraud, exceptions to the general rule which excludes parol evidence, and as standing upon the same policy as the rule itself. (Sec. 156.)

Relief will be granted in cases of written instruments only where there is a plain mistake, clearly made out by satisfactory proofs. (Sec. 157.)

A court of equity is not, like a court of law, bound to enforce a written contract; but it may exercise its discretion when a specific performance is sought, and may leave the party to his remedy at law. (Sec. 161.)

Equity may reform a written agreement, and direct the specific performance of it when so reformed.

Relief will be granted in equity in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction. (Sec. 162.)

The courts of equity will not rectify a voluntary deed unless all the parties consent. If any object, the deed must take its chances as it stands. (Sec. 164e.)

In all cases of mistakes in written instruments, equity will interfere only as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors or purchasers from them with notice of the facts. (Sec. 165.)

As against *bona fide* purchasers for a valuable consideration without notice, courts of equity will grant no relief, because they have at least an equal equity to the protection of the court.

Relief will be granted in cases of mistake in written instruments to prevent manifest injustice and wrong, and to suppress fraud; it will also be granted to supply defects where, by mistake, the parties have omitted any acts or circumstances necessary to give due validity and effect to written instruments. (Sec. 166.)

The same principle applies to cases where an instrument has been delivered up, or cancelled, under a mistake of the party, and in ignorance of the facts material to the rights derived under it. (Sec. 167.)

In all cases of relief by aiding and correcting defects or mistakes in the execution of instruments and powers, the party asking relief must stand upon some equity superior to that of the party against whom he asks it. (Sec. 176.)

In regard to mistakes in wills, it is said that courts of equity have jurisdiction to correct them when they are apparent upon the face of the will, or may be made out by a due construction of its terms, for in the cases of wills the intention will prevail over the words. (Sec. 179.)

ACTUAL OR POSITIVE FRAUD.

It may be laid down as a general rule, subject to but few exceptions, that courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes conclusive of, other courts. (Sec. 184.)

In a great variety of cases fraud is remediable, and effectually remediable, at law.

It is not easy to give a definition of fraud in the extensive signification in which that term is used in courts of equity; and it has been said that these courts have, very wisely, never laid down as a general proposition what shall constitute fraud, or any general rule beyond which

they will not go upon the ground of fraud, lest other means of avoiding the equity of the courts should be found out. (Sec. 186.)

Pothier says that the term fraud is applied to every artifice made use of by one person for the purpose of deceiving another.

Labeo defines *fraud* to be any cunning deception, or artifice, used to circumvent, cheat, or deceive another. (Sec. 186.)

Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. (Sec. 187.)

It is equally a rule in courts of law and courts of equity that fraud is to be presumed, but it must be established by proofs. (Sec. 190.)

Equity will grant relief upon the ground of fraud, established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law.

One of the largest classes of cases in which courts of equity are accustomed to grant relief is where there has been a misrepresentation, or *suggestio falsi*. (Sec. 191.)

If the misrepresentation was of a trifling or immaterial thing; or if the other party did not trust to it or was not misled by it; or if it was vague and inconclusive in its own nature, or if it was upon a matter of opinion or fact, equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other—in these and the like cases there is no reason for a court of equity to grant relief upon the ground of fraud.

Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the

affirmation of what is known to be positively false. (Sec. 193.)

It is immaterial whether the fraud was originally concocted by the principal or by the agent; the principal will be held implicated to the fullest extent, if he adopts the act of his agent. (Sec. 193a.)

In civil tribunals a person cannot be allowed to complain of trifling deviations from good faith in the party with whom he has contracted. Nothing but what is plainly injurious to good faith ought to be there considered as a fraud sufficient to impeach a contract. (Sec. 194.)

Ordinarily, matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against, because they are not presumed to mislead or influence the other party when each has equal means of information. (Sec. 197.)

Nor is it every willful misrepresentation, even of a fact, which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort. (Sec. 199.)

The defrauded party may, by his subsequent acts, with full knowledge of the fraud, deprive himself of all right to relief, as well in equity as at law. Thus, if he knew all the facts, and with such full information, he continued to deal with the party. (Sec. 203a.)

Another class of cases for relief in equity is where there is an undue concealment, or *suppressio veri*, to the injury or prejudice of another. (Sec. 204.)

It is not every concealment, even of facts material to the interests of a party, which will entitle him to the interposition of a court of equity. The case must amount to the suppression of facts which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent.

Equity will not correct or avoid a contract merely because a man of nice honor would not have entered into it. The case must fall within some definition of fraud; and the rule must be drawn so as not to affect the general transactions of mankind. (Sec. 205.)

It is a rule in equity that all the material facts must be known to both parties to render the agreement fair and just in all its parts; and it is against all the principles of equity that one party knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for specific performance, (Sec. 206.)

The definition of undue concealment, which amounts to fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiae*, but *juris et de jure* to know. (Sec. 207.)

At the common law, in the cases of sales of goods, the maxim *caveat emptor* is applied; and unless there be some misrepresentation or artifice to disguise the thing sold or some warranty as to its character or quality, the vendee is bound by the sale, notwithstanding there may be intrinsic defects and vices in it materially affecting its value. However questionable such a doctrine may be, courts of equity, as well as courts of law, abstain from any interference with it. (Sec. 212.)

The most comprehensive class of cases of undue concealment arises from some peculiar relation or fiduciary character between parties. (Sec. 218.)

In such cases, if there is any misrepresentation, or any concealment of a material fact, or any just suspicion or artifice or undue influence, courts of equity will interpose and pronounce the transaction void, and as far as possible restore the parties to their original rights. (Sec. 218.)

Equity will relieve from all unconscientious advantages or bargains obtained over persons disabled by weakness, infirm-

ity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity. (Sec. 221.)

The general theory of the law, in regard to acts done and contracts made by parties affecting their rights and interests is that in all such cases there must be a free and full consent to bind the parties. (Sec. 222.)

Consent is an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side.

It is upon this general ground — that there is a want of rational and deliberate consent — that the contracts and other acts of idiots, lunatics, and other persons *non compos mentis* are generally deemed to be invalid in courts of equity. (Sec. 223.)

It is a general principle that contracts made by persons in liquor, even though their drunkenness be voluntary, are utterly void, because they are incapable of any deliberate consent, in like manner as persons who are insane or *non compos mentis*. (Sec. 230.)

But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness — where the party is utterly deprived of the use of his reason and understanding. (Sec. 231.)

It may be stated as generally true that the acts and contracts of persons who are of weak understanding and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome, by cunning or artifice, or undue influence. (Sec. 238.)

The protection of courts of equity is not to be extended to every person of a weak understanding, unless there be some fraud or surprise; for courts of equity would

have enough to do if they were to examine into the wisdom and prudence of men in disposing of their estates.

The constant rule in equity is that, where the party is not a free agent and is not equal to protecting himself, the court will protect him. (Sec. 289.)

Circumstances, also, of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the court in setting aside a contract made by him, on account of some oppression, or fraudulent advantage, or imposition attendant upon it.

Mere inadequacy of price, or any other inequality in the bargain, is not to be understood as constituting, *per se*, a ground to avoid a bargain in equity. (Sec. 244.)

But where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud.

Equity will not relieve in all cases, even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed *in statu quo*. (Sec. 250.)

Cases of surprise and sudden action, without due deliberation, may properly be referred to the same head of fraud or imposition. (Sec. 251.)

The surprise here intended must be accompanied with fraud and circumvention, or at least by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him.

Gifts and legacies are often bestowed upon persons upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons; and equity will not suffer the manifest object of the condition to be defeated by the *fraud*, or dishonest, corrupt, or *unreasonable refusal* of the party whose consent is required to the marriage. (Sec. 257.)

In general, a contract which contemplates a fraud upon third parties is regarded as so far illegal between the immediate parties that neither will be entitled to claim the aid of equity in its enforcement. (Sec. 257a.)

CONSTRUCTIVE FRAUD.

Having considered the subject of actual or meditated and intentional fraud, we may now pass to another class of frauds, which, as contradistinguished from the former, are treated as legal or constructive frauds. (Sec. 258.)

By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, or to violate private or public confidence, or to impair or injure the public interests, are prohibited at law, as within the same reason and mischief as acts and contracts done *malò animo*.

Some cases of constructive frauds are so denominated because they are contrary to some general public policy, or artificial policy of the law. (Sec. 259.)

Among these may properly be placed contracts and agreements respecting marriage (commonly called marriage brokerage contracts), by which a party engages to give another a compensation if he will negotiate an advantageous marriage for him. Such contracts are utterly void, as *against public policy*. (Sec. 260.)

It is upon the same ground of public policy that contracts in restraint of marriage are held void. (Sec. 274.)

Conditions annexed to gifts, legacies, and devises, in restraint of marriage, are not void if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the marriage freedom. If the condition is in restraint of marriage generally, then, as a condition against public policy, it will be held utterly void. (Sec. 280.)

Courts of equity are not generally inclined to lend an indul-

gent consideration to conditions in restraint of marriage. (Sec. 286.)

Conditions annexed to devises, both of real and personal estate, to a widow, that they shall become inoperative in the event of the marriage of the devisee, have been generally recognized and sustained. (Sec. 291.)

Bargains and contracts made in restraint of trade constitute another class of constructive frauds, and are so deemed because inconsistent with the general policy of the law. (Sec. 292.)

Here the known and established distinction is between such bargains and contracts as are, in general, restraint of trade, and such as are in restraint of it only as to particular places or persons. The latter, if founded upon a good and valuable consideration, are valid. The former are universally prohibited.

In like manner, agreements which are founded upon violations of public trust, or confidence, or of the rules adopted by courts in furtherance of the administration of public justice, are held void. (Sec. 294.)

Another extensive class of cases falling under this head of constructive fraud respects contracts for the buying, selling, or procuring of public offices. (Sec. 295.)

In regard to gaming contracts, courts of equity ought not to interfere in their favor, but ought to afford aid to suppress them, since they are not only prohibited by statute, but may be justly pronounced to be immoral, as the practice tends to idleness and the ruin of families. (Sec. 303.)

It has been argued that the higher and wiser policy in regard to all illegal contracts would be to allow money paid in their furtherance to be recovered back. But the opposite rule prevails, with few exceptions. (Sec. 304.)

Generally, where the parties stand upon equal footing, and the contract is illegal they cannot expect aid either from the courts of law or equity.

The general rule is that wherever any contract or conveyance is void, either by a positive law or upon principles of

public policy, it is deemed incapable of confirmation upon the maxim *quod ab initio, non valet, in tractu temporis non convalescit*. But where it is merely voidable, or turns upon circumstances of undue advantage, surprise, or imposition, there, if it is deliberately and upon full examination confirmed by the parties, such confirmation will avail to give it an *ex post facto* validity. (Sec. 306.)

Let us pass to the consideration of the second head of constructive frauds — namely, of those which arise from some peculiar confidential or fiduciary relation between the parties. In this class of cases there is often to be found some intermixture of deceit, imposition, over-reaching, unconscionable advantage, or other mark of direct and positive fraud. (Sec. 307.)

The general principle which governs in all cases of this sort is that if a confidence is reposed, and that confidence is abused, courts of equity will grant relief. (Sec. 308.)

As to the relation of client and attorney or solicitor, it is obvious that this relation must give rise to great confidence between the parties, and to very strong influences over the actions and rights and interests of the client. (Sec. 310.)

The burden of establishing perfect fairness, adequacy and equity is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him, is bound to show that a reasonable use has been made of that confidence — a rule applying equally to all persons standing in confidential relations with each other. (Sec. 311.)

The relation of principal and agent is affected by the same considerations, founded upon the same enlightened public policy. Upon these principles if an agent, employed to purchase for another, purchases for himself, he will be considered as a trustee of his employer. (Sec. 315.)

In all cases of purchases and bargains respecting property, directly and openly made between principals and agents, the utmost good faith is required. (Sec. 316.)

The question in all such cases does not turn upon the point whether there is any intention to cheat or not, but upon the obligation from the fiduciary relation of the parties to make a frank and full disclosure.

It is a general rule that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it (Sec. 321.)

Executors and administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate.

It may be generally stated that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage. (Sec. 323.)

The case of principal and surety may be mentioned as an illustration of this doctrine. (Sec. 324.)

The contract of surety imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise, or by withholding proper information, will furnish sufficient grounds to invalidate the contract.

There must be something which amounts to fraud to enable the surety to say that he is released from his contract on account of misrepresentation or concealment. (Sec. 325.)

If a creditor without any communication with the surety and assent on his part, should afterwards enter into any new contract, with the principal, inconsistent with the former contract, or should stipulate in a binding manner, upon a sufficient consideration, for further delay and postponement of the day of payment of the debt, that will operate in equity as a discharge of the surety. (Sec. 326.)

Also, if the creditor has any security from the

debtor, and he parts with it without communication with the surety, or by his gross negligence it is lost, that will operate, at least to the value of the security, to discharge the surety.

The surety has a right, upon paying the debt to the principal, to be substituted in the place of the creditor, as to all securities held by the latter for the debt, and to have the same benefit that he would have therein. (Sec. 327.)

Contracts of suretyship, limited by time, are usually construed strictly, and not to extend beyond the period fixed. (Sec. 327a.)

The statute of frauds requires certain contracts to be in writing in order to give them validity. In the construction of that statute a general principle has been adopted that, as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, in a variety of cases, where from fraud, imposition, or mistake, a contract of this sort has not been reduced to writing, but has been suffered to rest in confidence, or in parol communications between the parties, equity will enforce it against the party guilty of a breach of confidence, who attempts to shelter himself behind the provisions of the statute. (Sec. 330.)

In regard to voluntary conveyances, they are protected in all cases where they do not break in upon the legal rights of creditors. (Sec. 355.)

If there is any design of fraud or collusion, or intent to deceive third persons, in such conveyances, although the party be not then indebted, the conveyance will be held utterly void as to subsequent as well as to present creditors, for it is not *bona fide*. (Sec. 356.)

A conveyance, even for a valuable consideration, is not, under the statute of the 13th of Elizabeth, valid in point of law from that circumstance alone. It must also be *bona fide*; for if it be made with intent to defraud or defeat creditors, it will be void, although there may, in the strictest sense, be a valuable, nay, an adequate, consideration. (Sec. 369.)

Although voluntary conveyances are, or may be, void as to existing creditors, they are perfect and effectual as between the parties, and cannot be set aside by the grantor if he should become dissatisfied with the transaction. (Sec. 371.)

The distinction between existing and subsequent creditors, in reference to voluntary conveyances, is that as to the former, fraud is an inference of law; and, as to the latter, there must be proof of fraud in fact.

Purchasers, bona fide, for a valuable consideration, without notice of the fraudulent or voluntary grant, are of such high consideration that they will be protected, as well at law as in equity, in their purchases. (Sec. 381.)

Where the parties are equally meritorious, and equally innocent, the known maxim of courts of equity is, *qui prior est in tempore, potior est in jure*; he is to be preferred who has acquired the first title.

Another class of constructive frauds of a large extent, and over which courts of equity exercise an exclusive and a very salutary control and jurisdiction, consists of those where a man designedly or knowingly produces a false impression upon another, who is thereby drawn into some act or contract injurious to his own rights or interests. (Sec. 384.)

The wholesome maxim of the law is that a party who enables another to commit a fraud is answerable for the consequences; and the maxim, *fraus est celare fraudem*, is, with proper limitations in its application, a rule of general justice.

In many cases a man may be innocently silent; for, as has often been observed, *aliud est tacere, aliud celare*. But, in other cases, a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction. (Sec. 385.)

Thus, if a party having a title to an estate should stand by and allow an innocent purchaser to expend money upon the estate, without giving him notice he would not be permitted, in equity, to assert that title against such

purchaser, at least not without fully indemnifying him for all his expenditures.

Where one of two innocent persons must suffer a loss, and, *a fortiori*, in cases where one has misled the other, he who is the cause or occasion of that confidence by which the loss has been caused or occasioned ought to bear it.

Cases of this sort are viewed with so much disfavor by courts of equity that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation; for neither infants nor *femes covert* are privileged to practice deception or cheats on other innocent persons.

Another class of constructive frauds consists of those where a person purchases with full notice of the legal or equitable title of other persons to the same property. In such cases he will not be permitted to protect himself against such claims, but his own title will be postponed, and made subservient to theirs. (Sec. 395.)

What shall constitute notice, in cases of *subsequent purchasers*, is a point of some nicety, and resolves itself sometimes into a matter of fact and sometimes into a matter of law. (Sec. 399.)

Notice may be either actual and positive, or it may be implied and constructive.

Constructive notice is knowledge imputed by the court, on presumption too strong to be rebutted that the knowledge must have been communicated.

To constitute constructive notice it is not indispensable that it should be brought home to the party himself. It is sufficient if it is brought home to the agent, attorney, or counsel of the party; for, in such cases, the law presumes notice to the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter. (Sec. 408.)

Another branch of constructive frauds is that of *voluntary conveyances of real estate* in regard to subsequent purchasers. This is founded, in a great measure, upon the pro-

visions of the statute, 27th Elizabeth, ch. 4. The object of the statute was to give full protection to subsequent purchasers, from the grantor, against mere volunteers under prior conveyance. (Sec. 425.)

The true construction of the statute is that conveyances are not avoided merely because they are voluntary, but because they are fraudulent.

A voluntary gift of real estate is valid against subsequent purchasers, and all other persons, unless it was fraudulent at the time of its execution; and a subsequent conveyance, for a valuable consideration, is evidence, but by no means conclusive evidence, of fraud in the first voluntary conveyance.

Courts of equity will not interpose where the property has been conveyed by the voluntary and covenous grantee to a *bona fide* purchaser, for valuable consideration, without notice. Such a person is always a favorite in equity, and is always protected. His equity is equal to that of any other person, whether he be a creditor or a purchaser of the grantor; and, where equities are equal, the rule applies *potior est conditio possidentis*. (Sec. 434.)

Where there is a *bona fide* purchaser from the voluntary or fraudulent grantor, and another from the voluntary or fraudulent grantee, the grantees will have preference according to the priority of their respective titles.

The beautiful character and prevailing excellence of equity jurisprudence is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case. Thus, to present a summary of what has been already stated, if conveyances or other instruments are fraudulently or improperly obtained, they are decreed to be given up and canceled. If they are money securities, on which the money has been paid, the money is decreed to be paid back. If they are deeds, or other muniments of title detained from the rightful party, they are decreed to be delivered up. If they are deeds, suppressed or spoliated, the party is decreed to hold the same rights as if they

were in his possession and power. If there has been any undue concealment or misrepresentation, or specific promise collusively broken, the injured party is placed in the same situation, and the other party is compelled to do the same acts as if it had all been transacted with the utmost good faith. (Sec. 439.)

It may be also stated, by way of summary, that if the party says nothing, but by his expressive silence misleads another to his injury, he is compellable to make good the loss; and his own title, if the case requires it, is made subservient to that of the confiding purchaser. If a party by fraud or misrepresentation, induces another to do an act injurious to a third person, he is made responsible for it. If by fraud or misrepresentation he prevents acts from being done, equity treats the case, as to him, as if it were done, and makes him a trustee for the other. So, if a will is revoked by a fraudulent deed, the revocation is treated as a nullity and if a devisee obtains a devise by fraud, he is treated as a trustee of the injured party.

ACCOUNT.

One of the most ancient forms of action, at the common law, is the action of account. (Sec. 442.)

But the modes of proceeding in that action were found so very dilatory that, as soon as courts of equity began to assume jurisdiction in matters of account, as they did at a very early period, the remedy at law began to decline. (Sec. 442.)

As courts of equity entertain concurrent jurisdiction to the fullest extent with courts of law in matters of account, the decision as to the proper tribunal must be governed by considerations of convenience. (Sec. 442a.)

Courts of equity in suits of this nature proceed, in many respects, in analogy to what is done at law. The cause is referred to a master (acting as auditor), before whom the account is taken, and he is armed with the fullest powers, not

only to examine the parties on oath, but to make all the inquiries, by testimony under oath and by documents and books, which are necessary to the due administration of justice. (Sec. 450.)

The whole machinery of courts of equity is better adapted to the purpose of an account, in general, for in a complicated account a court of law would be incompetent to examine it at *nisi prius* with all the necessary accuracy. This is the principle on which courts of equity constantly act, by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot be properly taken at law. (Sec. 451.)

The general ground asserted for the jurisdiction is not that there is no remedy at law, but that the remedy is more complete and adequate in equity. (Sec. 457.)

Equity will also entertain jurisdiction in matters of account, not only when there are merely mutual accounts, but also when the accounts to be examined are on one side only, and a *discovery* is wanted in aid of account, and is obtained. (Sec. 458.)

APPROPRIATION.—In matters of account, where several debts are due by the debtor to the creditor, it often becomes material to ascertain to what debt a particular payment made by the debtor is to be applied. This is called the appropriation of payments. (Sec. 459b.)

In the case of running accounts between parties, where there are various items of debt on one side and various items of credit on the other side, occurring at different times, and no special appropriation of the payments is made by either party, the successive payments or credits are to be applied to the discharge of the items of debit and antecedently due in the order of time in which they stand in the account.

Where there are no running accounts between the parties, and the debtor himself makes no special appropriation of any payment, there the creditor is generally at liberty to apply that payment to any one or more of the debts which the debtor owes him, whether it be upon an account or otherwise.

A creditor has no right to apply a general payment to any item of account which is itself illegal and contrary to law, as a claim for usurious interest.

But if the debtor so apply the payment, he cannot afterwards revoke it.

If neither party has made any appropriation, then the law will make the appropriation according to its notion of the equity and justice of the case, and so that it may be most beneficial to both parties. (Sec. 459c.)

APPORTIONMENT.—CONTRIBUTION AND GENERAL AVERAGE are usually treated of under this head, as they are in some measure blended together, and require and terminate in accounts. (Sec. 469.)

In most of these cases a discovery is indispensable for the purposes of justice; and where this does not occur there are other distinct grounds for the exercise of equity jurisdiction, in order to avoid circuitry and multiplicity of actions.

Apportionment is sometimes used to denote the contribution which is to be made by different persons, having distinct rights, towards the discharge of a common burden or charge to be borne by all of them. (Sec. 470.)

In respect to apportionment, in its application to contracts in general, it is the known and familiar principle of the common law that an entire contract is not apportionable. The reason given is that, as the contract is founded upon a consideration dependent upon the entire performance of the act, and if from any cause it is not wholly performed, the *casus foederis* does not arise, and the law will not make provisions for exigencies which the parties have neglected to provide for themselves.

At the common law the cases are few in which an apportionment under contracts is allowed, the general doctrine being against it unless specially stipulated by the parties. (Sec. 471.)

Thus, for instance, where a person was appointed a collector of rents for another, and was to receive \$100 per annum for

his services, and he died at the end of three quarters of the year while in the service, it was held that his executor could not recover \$75 for the three-quarters' service upon the ground that the contract was entire and there could be no apportionment.

Courts of equity, to a considerable extent, act upon this maxim of the common law in regard to contracts. But where equitable circumstances intervene they will grant redress.

A very important and beneficial exercise of equity jurisdiction, in cases of apportionment and contribution, is when incumbrances, fines, and other charges on real estate, are required to be paid off, or are actually paid off by some of the parties in interest. (Sec. 483.)

GENERAL AVERAGE — a subject of daily occurrence in maritime and commercial operations — furnishes another class of cases over which equity exercises jurisdiction.

General average, in the sense of the maritime law, means a general contribution that is to be made by all parties in interest towards a loss or expense, which is voluntarily sustained or incurred for the benefit of all. (Sec. 490.)

The principle upon which this contribution is founded is not the result of contract, but has its origin in the plain dictates of natural law. (Sec. 490.)

A court of equity, having authority to bring all the parties before it, and to refer the whole matter to a master, *to take an account*, and to adjust the whole apportionment at once, affords a safe, convenient, and expedient remedy. (Sec. 491.)

CONTRIBUTION BETWEEN SURETIES.— Where, between sureties who are bound for the same principal, and upon his default one of them is compelled to pay the money, or to perform any other obligation for which they all became bound, the surety who has paid the whole is entitled to receive contribution from all the others for what he has done in relieving them from a common burden. (Sec. 492.)

As all are equally bound and are equally relieved, it seems

but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim *qui sentit commodum, sentire debet et onus*. (Sec. 498.)

The ground of relief does not stand upon any notion of mutual contract, express or implied between the sureties, to indemnify each other in proportion, but arises from principles of equity, independent of contract.

There are many cases in which the relief is more complete and effectual in equity than it can be at law, as, for instance, where an account and discovery are wanted, or where there are numerous parties in interest, which would occasion a multiplicity of suits. (Sec. 496.)

In some cases the remedy at law is inadequate. Thus, if there are four sureties, and one is insolvent, a solvent surety who pays the whole debt can recover only one-fourth part thereof (and not a third part) against the other two solvent sureties. But in a court of equity he will be entitled to recover one-third part of the debt against each of them; for, in equity, the insolvent's share is apportioned among all the other solvent sureties.

In some States courts of law follow the rule adopted in courts of equity in apportioning the share of an insolvent surety upon those who remain solvent. (Sec. 496a.)

Upon like grounds, if one of the sureties dies, the remedy at law lies only against the surviving parties; whereas, in equity, it may be enforced against the representative of the deceased party, and he may be compelled to contribute his share to the surviving surety, who shall pay the whole debt. (Sec. 497.)

At law the release or discharge of one surety by the creditor will operate as a discharge of all the other sureties, even though it may be founded on a mere mistake of law. But this rule does not universally prevail in equity. (Sec. 498a.)

Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal, but they are also entitled to the

benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities. (Sec. 499.)

And in equity the sureties are entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt.

It is a rule in equity that a creditor shall not, by his own election of the fund out of which he will receive payment, prejudice the rights which other persons are entitled to; but they shall either be substituted to his rights, or they may compel him to seek satisfaction out of the fund to which they cannot resort.

Thus, where a party having two funds to resort to for payment of his debt, elects to proceed against one, and thereby disappoints another party, who can resort to that fund only. In such a case the disappointed party is substituted in the place of the electing creditor, or the latter is compelled to resort, in the first instance, to that fund which will not interfere with the rights of the other.

The surety upon payment of the debt, is entitled to be subrogated to all the rights of the creditor. (Sec. 499e.)

If the surety has a counter-bond or security from the principal, the creditor will be entitled to the benefit of it, and may in equity reach such security to satisfy the debt. (Sec. 502.)

And the surety, by making a new and independent arrangement with the creditor in regard to the security of the debt, puts himself in the place of a principal, and cannot thereafter complain of the creditor for any want of diligence in pursuing the principal. (Sec. 502b.)

Contribution lies between partners, for any excess which has been paid by one partner beyond his share, against the other partners, if, upon a winding-up of the partnership affairs, such a balance appears in his favor; or if, upon a

dissolution, he has been compelled to pay any sum for which he ought to be indemnified. (Sec. 504.)

Contribution also lies between joint-tenants, tenants in common, and part owners of ships and other chattels, for all charges and expenditures incurred for the common benefit. (Sec. 505.)

The remedial justice of courts of equity, in all cases of apportionment and contribution, is so complete, and so flexible in its adaptation to all the particular circumstances and equities, that it has, in a great measure, superseded all efforts to obtain redress in any other tribunals.

There are some matters of defense particularly belonging to matters of account. Thus, it is ordinarily a good bar to suit for an account that the parties have already, in writing, stated and adjusted the items of the account, and struck the balance. In such case equity will not interfere, for there is a remedy at law, and no ground for resorting to equity. (Sec. 523.)

If there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is, in truth, vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined.

What shall constitute, in the sense of a court of equity, a stated account, is, in some measure, dependent upon the particular circumstances of the case. It is sufficient if it has been examined and accepted by both parties. And this acceptance need not be express, but may be implied from circumstances. (Sec. 526.)

Between the merchants at home, an account which has been presented, and no objection made thereto after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account.

In regard to acquiescence in stated accounts, although it amounts to an admission or presumption of their correctness, it by no means establishes the fact of their having been settled,

even though the acquiescence has been for a considerable time. (Sec. 528.)

A settled account will be deemed conclusive between the parties unless some fraud, mistake, or omission is shown. For it would be most mischievous to allow settled accounts between the parties, especially where vouchers have been delivered up or destroyed, to be unsettled, unless for urgent reasons.

In matters of account, although not barred by the statute of limitations, courts of equity refuse to interfere after a considerable lapse of time, and the original transactions have become obscure or the evidence lost; they act upon the maxim, *vigilantibus, non dormientibus, jura subveniunt*. (Sec. 529.)

It is said that where there is no legal remedy it does not therefore follow that there must be an equitable remedy, unless there is also an equitable right. Where there is a legal right there must be a legal remedy; and if there is no legal right, in many cases there can be no equitable one.

Courts of equity also exercise a concurrent jurisdiction in the administration of the assets of deceased persons, and a similar jurisdiction in regard to *legacies, confusion of boundaries, dower, marshaling of securities, and partition* — all of which the student can only comprehend by a careful perusal of the details as given in the text-books.

PARTNERSHIP.

In cases of PARTNERSHIP, where a remedy at law actually exists, it is often found to be very imperfect, inconvenient, and circuitous. But, in a very great variety of cases, there is, in fact, no remedy at all at law to meet the exigency of the case. The powers of the court of equity will be found most effective, by means of a bill of discovery, to bring out all the facts, as well in controversies between all the partners themselves as between them and third persons. (Sec. 659.)

The most extensive, and, generally, the most operative remedy at law between partners, is an action of account. This is the appropriate, and, except under very peculiar circumstances, is the only remedy, at the common law, for the final adjustment and settlement of partnership transactions. (Sec. 662.)

But the remedial justice, administered by courts of equity, is far more complete, extensive, and various — adapting itself to the peculiar nature of the grievance, and granting relief in the most beneficial and effective manner, where no redress could be obtained at law. (Sec. 666.)

After the commencement, and during the continuance of a partnership, courts of equity will, in many cases, interpose to decree a specific performance of agreements in the articles of partnership. (Sec. 667.)

In case of a partnership existing during the pleasure of the parties, if a sudden dissolution is about to be made, in ill faith, and will work irreparable injury, courts of equity will, upon their ordinary jurisdiction to prevent irreparable mischief, grant an injunction against such a dissolution. (Sec. 668.)

Equity will also interfere, by injunction, to prevent a partner, during the continuance of the partnership, from doing any acts injurious thereto, as by signing or indorsing notes to the injury of the partnership, or by driving away customers, or by violating the rights of the other parties, or his duty to them, even when a dissolution is not necessarily contemplated. (Sec. 669.)

But equity will not, in all cases, interfere to enforce a specific performance of the articles of partnership. Where a remedy at law is entirely adequate, no relief will be granted in equity. (Sec. 670.)

Courts of equity may not only provide for a more effectual settlement of all the accounts of the partnership, after a dissolution, but they may take steps for this purpose which courts of law are inadequate to afford. (Sec. 671.)

It is the duty of courts of equity to adapt their

practice and course of proceeding to the existing state of society, and not, by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. A general rule, established for the convenient administration of justice, must not be adhered to in cases in which, consistently with practical convenience, it is incapable of application; it is better to go as far as possible towards justice, than to deny it altogether.

Where a dissolution has taken place, an account will not only be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business, and make sale of the partnership property, so that a final distribution may be made of the partnership effects. This a court of law is incompetent to do. (Sec. 672.)

The accounts are usually taken before a master, who examines the parties, if necessary, and requires the production of all the books, papers, and vouchers of the partnership, and he is armed from time to time by the court with all the powers necessary to effectuate the objects of the reference to him.

A receiver or manager will not be appointed at the instance of one of the partners, in a suit which does not seek to dissolve the partnership. (Sec. 672a.)

The power to dissolve a partnership during the term for which it is stipulated is also exercised by courts of equity. And this is a peculiar remedy which courts of law are incapable of administering. (Sec. 673.)

Such a dissolution may be granted on account of the impracticability of carrying on the undertaking, either at all, or according to the stipulations of the articles. It may be granted on account of the insanity or permanent incapacity of one of the partners. Also on account of the gross misconduct of one or more of the partners. But trifling faults and misbehavior, which do not go to the substance of the contract, do not constitute sufficient ground to justify a decree for dissolution.

Where the circumstances have so changed, and the conduct of the parties is such as to render it impossible to continue the relation without injury to all the partners, the court will decree a dissolution. (Sec. 673b.)

The real estate is treated, to all intents and purposes, as a part of the partnership funds, whatever may be the form of the conveyance. For equity considers the real estate, to all intents and purposes, as personal estate, and subjects it to all the equitable rights and liens of the partners which would apply to it if it were personal estate. (Sec. 674.)

The creditors of the partnership have the preference to have their debts paid out of the partnership funds before the private creditors of either of the partners. (Sec. 675.)

And it seems that the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything.

Or, as it is said, where there are partnership property and partnership creditors, and separate property and separate creditors, each class of creditors must look to their separate estates, without jostling each other for payment in the first instance.

Each has a priority on its respective estate; after it is satisfied the other may come upon the residue, according to its several legal and equitable rights.

This rule can only become material in cases of insolvency or bankruptcy, where the necessity may arise for marshaling assets. Prior to, and independent of, this, the rights of creditors remain to enforce the payment of debts due them at law.

In cases of partnership debts, if one of the partners dies and the survivor becomes insolvent or bankrupt, the joint creditors have a right to be paid out of the estate of the deceased partner, through the medium of the equities subsisting between the partners. (Sec. 676.)

The ground of the doctrine is that every partnership

debt is joint and several; and, in all such cases, resort may primarily be had for the debt to the surviving partners, or to the assets of the deceased partner.

At law an execution for the separate debt of one of the partners may be levied upon the joint property of the partnership. In such a case, however, the judgment creditor can levy on the interest only of the judgment debtor, if any, in the property, after payment of all debts and other charges thereon. (Sec. 677.)

The creditor can take only the same interest in the property which the judgment debtor himself would have upon the final settlements of all the accounts of the partnership. And after the sale of the interest of the partner, the vendee has a right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property which shall be ascertained to exist.

The remedy for the other partners, if nothing is due to the judgment debtor out of the partnership funds, is to file a bill in equity against the vendee of the sheriff, to have the proper accounts taken.

In the case of two firms dealing with each other, where some or all the partners in one firm are partners with other persons in the other firm, no suit can be maintained at law in regard to any transactions or debts between the two firms; for, in such suit, all the partners must join and be joined; and no person can maintain a suit against himself, or against himself and others. (Sec. 679.)

But in equity it is otherwise, for there it is sufficient that all the parties in interest are before the court as plaintiffs or as defendants, and they need not, as at law in such cases, be on the opposite sides of the record. (Sec. 680.)

Equity, in all such cases, looks behind the form of the transactions to their substance, and treats the different firms, for the purpose of substantial justice, exactly as if they were composed of strangers, or were, in fact, corporate companies.

If one partner, in fraud of the partnership rights or credits, should release an action, that release would, *at law*, be obligatory upon all the partners. But equity would not hesitate to relieve the partnership. (Sec. 681.)

Where a discovery, an account, a contribution, an injunction, or a dissolution is sought, in cases of partnership or where a due enforcement of partnership rights and duties and credits is required, it is plain to perceive that, generally, a resort to courts of law would be little more than a solemn mockery of justice. (Sec. 683.)

It is said that where there is a right there ought to be a remedy, and, if the *law* gives none, it ought to be administered in equity. This principle is of frequent application in equity, but it is not to be understood as of universal application.

DISCOVERY.

CANCELLATION AND DELIVERY OF INSTRUMENTS. — Every original bill in equity may, in truth, be properly deemed a bill of discovery, for it seeks a disclosure of circumstances relative to the plaintiff's case. (Sec. 689.)

But that which is usually distinguished by this appellation is a bill for the discovery of facts, resting in the knowledge of the defendant, or of deeds, or writings, or other things in his custody, possession, or power, but seeking no relief in consequence of this discovery, although it may pray for a stay of proceedings at law until the discovery shall be made.

Courts of law are incompetent to compel such a discovery, and, therefore, it properly falls under the head of the *exclusive* jurisdiction of courts of equity.

The court, having acquired cognizance of the suit for the purpose of *recovery*, will entertain it for the purpose of *relief* in most cases of fraud, account, accident, and mistake. (Sec. 691.)

Equity also exercises jurisdiction over cases where the *rescission*, *cancellation*, or *delivery up* of agreements, securi-

ties or deeds is sought, or a *specific performance* is required of the terms of such agreements, securities, or deeds, as indispensable to reciprocal justice. (Sec. 692.)

Courts of law are utterly incompetent to make *specific decree for any relief of this sort*.

Application to a court of equity, in all cases of this sort, is not, strictly speaking, a matter of absolute right upon which the court is bound to pass a final decree. But it is a *matter of sound discretion* to be exercised by the court, either in granting or refusing relief. (Sec. 693.)

The principle upon which courts of equity direct the *delivery up, cancellation, or rescission* of agreements, securities, deeds, or other instruments, is technically called *quia timet* — that is, for fear that such agreements or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest. (Sec. 694.)

Equity will generally set aside, cancel, and direct to be delivered up, agreements and other instruments, however solemn in their form or operation, where they are *voidable*, and not merely void, under the following circumstances: *first*, where there is *actual fraud*, in the party defendant, in which the plaintiff has not participated; *secondly*, where there is a *constructive fraud* against public policy, and the plaintiff has not participated therein; *thirdly*, where there is a *fraud against public policy*, and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand; *lastly*, where there is a constructive fraud by both parties, but they are not *in pari delicto*. (Sec. 695.)

A party ought not to be permitted to avail himself of any agreement, deed, or other instrument, procured by his own actual or constructive fraud, or by his own violation of legal duty or public policy, to the prejudice of an innocent party. (Sec. 695a.)

The third class of cases may be illustrated by the common case of gaming security, which will be decreed to be given

up, notwithstanding both parties have participated in the violation of the law.

The fourth class may also be illustrated by cases where although both parties have participated in the guilty transaction, yet the party who seeks relief has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of age or condition.

Where a delivery up, or cancellation of deeds or other instruments, is sought, either upon the ground of their original invalidity, or of their subsequent satisfaction, or because the party has a just title thereto, or derives an interest under them, courts of equity act upon an enlarged and comprehensive policy, and in granting relief will impose such terms and qualifications as shall meet the just equities of the opposing party. (Sec. 707.)

In case of chattels courts of equity will not, ordinarily, interfere to decree a specific delivery, because by a suit at law a full compensation may be obtained in damages, although the thing itself cannot be specifically obtained; and when such remedy at law is perfectly adequate and effectual, there is no reason why equity should afford any aid to the party. (Sec. 708.)

But there are cases of personal goods and chattels in which the remedy at law by damages would be utterly inadequate and leave the injured party in a state of irremediable loss. (Sec. 709.)

In such cases equity will grant relief by requiring the specific delivery of the thing, which is wrongfully withheld.

This will be done in cases where the principal value of the chattel consists in its high antiquity, or in its being a family relic, ornament, or heirloom — such as ancient gems, medals, coins, paintings of old and distinguished masters, ancient statues and busts.

Relief will also be granted in equity where the party in possession of the chattel has acquired such possession through an alleged abuse of power on the part of one standing in a fiduciary relation to the plaintiff.

SPECIFIC PERFORMANCE.

Equity, in obedience to the cardinal rule of natural justice, that a person should perform his agreement, enforces, pursuant to a regulated and judicial discretion, the actual accomplishment of a thing stipulated for, on the ground that what is lawfully agreed to be done ought to be done.

This branch of equity jurisdiction is of a very ancient date. It may be distinctly traced back to the reign of Edward IV., for in the Year Books of that reign it was expressly recognized by the chancellor as a clear jurisdiction. (Sec. 716.)

The ground of the jurisdiction is that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which in many cases, would fall far short of the redress which his situation might require.

Whenever a party wants the thing *in specie*, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance.

With reference to the present subject, *agreements* may be divided into three classes: (1) those which respect personal property; (2) those which respect personal acts; and (3) those which respect real property. (Sec. 718.)

Although the general rule is not to entertain jurisdiction in equity for a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature, yet the rule is, as we have seen, a qualified one and subject to exceptions; or rather, the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. (Sec. 718.)

Cases of agreements to form a partnership, and to execute articles accordingly, may be specifically decreed, although they relate exclusively to chattel interests; and so of a covenants for a lease or to renew a lease; so of a contract

for the sale of the good-will of a trade and of a valuable secret connected with it; for no adequate compensation can, in such cases, be made at law. (Sec. 722.)

And if a party covenants that he will not carry on his trade within a certain distance, or in a certain place within which the other party carries on the same trade, a court of equity will restrain the party from breaking the agreement so made. In such cases the decree operates, *pro tanto*, as a specific performance (Sec. 722a.)

The jurisdiction of courts of equity, to decree a specific performance of contracts, is not dependent upon or affected by the form or character of the instrument.

It is maintained that courts of equity ought not to decline the jurisdiction for a specific performance of contracts whenever the remedy at law is doubtful in its nature, extent, operation, or adequacy.

It is not necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it; if the agreement is certain, fair, and just in all its parts, and signed by the party sought to be charged, that is sufficient; the want of mutuality in the signature merely is no objection to its enforcement. (See 736.)

In cases of specific performance courts of equity sometimes follow the law and sometimes go far beyond the law, and their doctrines, if not wholly independent of the point whether damages would be given at law, are not in general dependent upon it. (Sec. 741.)

Sometimes damages may be recoverable at law when courts of equity would not yet decree a specific performance; and, on the other hand, damages may not be recoverable at law, and yet relief would be granted in equity.

The most numerous class of cases in which courts of equity are called upon to decree a specific performance of contracts is that class *respecting land*. (Sec. 743.)

A bill for a specific performance of a contract respecting land may be entertained by courts of equity, although the land is situate in a foreign country, if the parties are resident within

the territorial jurisdiction of the court. The ground of this jurisdiction is that courts of equity have authority to act upon the person; *æquitas agit in personam*; for, in all suits in equity, the primary decree is *in personam* not *in rem*.

But a court of equity has no jurisdiction in cases touching lands in foreign countries, unless the relief sought is of such a nature as the court is capable of administering in the given case. (Sec. 744a.)

The jurisdiction of courts of equity, to decree specific performance, is, in cases of contracts respecting land, universally maintained; whereas, in cases respecting chattels, it is limited to special circumstances. (Sec. 746.)

If a man contracts for a hundred bales of cotton, or boxes of sugar, of a particular description or quality, if the contract is not specifically performed, he may, generally, with a sum equal to the market price, purchase other goods of the same kind and quality, and thus completely obtain his object and indemnify himself against loss.

But in contracts respecting a specific messuage or parcel of land it is different; the locality, character vicinage, soil, easements, or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser, so that it cannot be replaced by other land of the same precise value, and, therefore, compensation in damages would not be adequate relief.

Courts of equity will not permit the forms of law to be made the instruments of injustice; and they will, therefore, interpose against parties attempting to avail themselves of the rigid rules of law for unconscientious purposes. (Sec. 747.)

They dispense with that which would make a compliance with what the law requires oppressive, and, in various cases of such contracts, they are in the constant habit of relieving a party who has acted fairly, although negligently. (Sec. 748.)

It seems that where the party against whom the decree is sought shows to the satisfaction of the court that he entered

into the contract under a *bona fide* misapprehension in a material point, the contract will not be carried into effect. Thus, where A, by letter, offered to sell some property to B for £1,250, and B, by letter, accepted the offer, and A, by mistake, inserted £1,250 in his letter instead of £2,250, and so informed B immediately, equity would not enforce the contract. (Sec. 749b.)

He who seeks a specific performance must show an execution, or an offer to execute, on his part.

Equity will not decree a specific performance where the contract is founded in fraud, imposition, mistake, undue advantage, or gross misrepresentation; or where from a change of circumstances, or otherwise, it would be unconscionable to enforce it. (Sec. 750a.)

Specific performance will be decreed where the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed. (Sec. 751.)

In some cases courts of equity will decree the specific performance of contracts respecting lands, where they are within the provisions of the statutes of frauds and perjuries. That statute has been generally re-enacted or adopted in this country. 29 Car. II., ch. 3.

It enacts: "That all interests in lands, tenements, and hereditaments, except leases for three years, not put in writing and signed by the parties or their agents authorized by writing, shall not have, nor be deemed in law or equity to have, any greater force or effect than leases on estates at will." It further enacts: "That no action shall be brought, whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning, the same, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall

be in writing and signed by the party or his lawful agent." (Sec. 752.)

The objects of this statute are such as the very title indicates—to prevent the fraudulent setting up of pretended agreements, and then supporting them by perjury. (Sec. 753.)

Besides, there is a manifest policy in requiring all contracts of an important nature to be *reduced to writing*, since otherwise, from the imperfection of memory, and the honest mistakes of witnesses, it must often happen either that the specific contract is incapable of exact proof, or that it is unintentionally varied from its precise original terms.

Equity will enforce a specific performance of a contract within the statute, *not in writing*, where it is fully set forth in the bill, and is confessed by the answer of the defendant. But even where the answer confesses the parol agreement, if it insists, by way of defense, upon the protection of the statute, the defense must prevail as a bar. (Sec. 755.)

So will equity enforce a specific performance of a contract within the statute where the parol agreement has been partly carried into execution.

Otherwise one party would be able to practice a fraud upon the other, and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. (Sec. 759.)

Where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice.

It was formerly thought that a deposit or security, or payment of the purchase money or a part of it, was such a part performance as took the case out of the statute. But this doctrine is overthrown. (Sec. 760.)

One ground why part payment is not deemed a part performance sufficient to lift the case out of the statute is that the

money can be recovered back again at law, and, therefore, the case admits of full and direct compensation.

Another ground is that the statute has said in another clause (that which respects contracts for goods) that part payment, by way of earnest, shall operate as a part performance. And hence the courts have considered this clause as excluding, by implication, agreements for lands.

But the general rule in cases of this sort is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed. (Sec. 761.)

Thus, where a vendee upon a parol agreement for a sale of land should proceed to build a house on the land in the confidence of a due completion of the contract, in such a case it would be a manifest fraud upon the party to permit the vendor to escape from a strict fulfillment of such agreement.

To take a case out of the statute because of part performance of a parol contract, it is indispensable that the acts done should be clear and definite, and referable exclusively to the contract; and the contract should also be established by competent proofs to be clear, definite, and unequivocal in all its terms. (Sec. 764.)

A contract cannot rest partly in writing and partly in parol. The writing is the highest evidence, and does away with the necessity and effect of the parol evidence if it is contradictory to it. (Sec. 767.)

When the court simply *refuses* to enforce the specific performance of a contract, it leaves the party to his remedy at law. (Sec. 769.)

Equity will allow the defendant to show that by fraud, accident, or mistake, the thing bought is different from what he intended; or that material terms have been omitted in the written agreement; or that there has been a variation of it by parol; or that there has been a parol discharge of a written contract. (Sec. 770.)

The ground of this doctrine is that courts of equity

ought not to be active in enforcing claims which are not, under the actual circumstances, just as between the parties.

In general, it may be stated that to entitle a party to a specific performance, he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards performance on his own part. (Sec. 771.)

If the plaintiff has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed; for courts of equity do not, any more than courts of law, administer relief to the gross negligence of suitors.

In some cases courts of equity will decree a specific execution not according to the letter of the contract if that will be unconscientious, but they will modify it according to the change of circumstances. (Sec. 775.)

A court of equity will also decree specific performance in some cases, where the action at law has been lost by the default of the party seeking the specific performance, if it be, notwithstanding, *conscientious* that the agreement should be performed.

Time is not generally deemed in equity to be of the essence of the contract unless the parties have expressly so stated it, or it necessarily follows from the nature and circumstances of the contract. (Sec. 776.)

But courts of equity have regard to time so far as it respects the good faith and diligence of the parties. If, however, circumstances of a reasonable nature have *disabled the party* from a strict compliance, or if he comes, *recenti facto*, to ask for a specific performance, the suit will be treated with indulgence, and, generally, with favor by the court.

Equity will also relieve the party vendor, by decreeing a specific performance where he has been unable to comply with his contract according to the terms of it, from the state of his title at the time if he comes within a reasonable time and the defect is cured. (Sec. 777.)

So, if he is unable to make a good title at the time when

the bill is brought, if he is in a condition to make such a title at or before the time of the decree.

Where there is a substantial defect in the estate sold, either in the title itself or in the representation or description, or the nature, character, situation, extent, or quality of it, which is unknown to the vendee, and in regard to which he is not put upon inquiry there a specific performance will not be decreed against him. (Sec. 778.)

The general rule is that the *purchaser*, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have abatement out of the purchase money, or compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate. (Sec. 779.)

But if the purchaser should insist upon such a performance, the court will grant relief only upon his compliance with equitable terms.

If a man, in confidence of the parol promise of another to perform the intended act, should omit to make certain provisions, gifts, or arrangements for other persons, *by will or otherwise*, such a promise would be specifically enforced in equity against such promisees, although founded on a *parol declaration*, creating a trust contrary to the statute of frauds; for it would be a fraud upon all the other parties to permit him to derive a benefit from his own breach of duty and obligation. (Sec. 781.)

Thus, where a testator was about altering his will for fear that there would not be assets enough to pay all the legacies, and his heir at law persuaded him not to alter it, promising to pay all the legacies, he was decreed specifically to perform his promise.

Privity of contract between the parties, is, in general, indispensable to a suit at law; but courts of equity act in favor of all persons, claiming by assignment under the parties, independent of any such privity. (Sec. 783.)

If a person has, in writing, contracted to sell land, and afterwards refuses to perform his contract, and then sells the land

to a purchaser, with notice of the contract, the latter will be compelled to perform the contract of his vendor, for he stands upon the same equity; and although he is not personally liable on the contract, yet he will be decreed to convey the land, for he is treated as a trustee of the first vendee. (Sec. 784.)

In general, where the specific execution of a contract respecting lands will be decreed between the parties, it will be decreed between all persons claiming under them in privity of estate, or representation, or of title, unless other controlling equities are interposed. (Sec. 788.)

The general principle upon which this doctrine proceeds is that, from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money, a trustee to the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either, with notice, becomes subject to the same equities, as the party would be from whom he purchased. (Sec. 789.)

Where a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land even before the conveyance is made, and it passes by descent to his heir as land. The vendor is deemed in equity to stand seized of it for the benefit of the purchaser. (Sec. 790.)

The vendor may come into equity for a specific performance of the contract on the other side, and to have the money paid; for the remedy in cases of specific performance is mutual, and the purchase money is treated as the personal estate of the vendor, and goes as such to his personal representatives.

In respect to voluntary contracts, or such as are not founded in a valuable consideration, courts of equity do not enforce them, either as against the party himself or as against other volunteers claiming under him. (Sec. 793b.)

Where there is any matter affecting the contract about which

the party might *bona fide* make a mistake, and he swears positively that he did make such mistake, a court of equity will not decree specific performance against him. (Sec. 798h.)

Where the party agrees to convey the land with full covenants of warranty and release of dower, and he is unable to procure the release of dower, a decree of specific performance will be made with compensation for the right of dower, and an exception to that extent in the covenants. (Sec. 798t.)

Courts of equity exercise a discretion in decreeing specific performance, and where the title to any portion of the estate fails, or is not of a marketable character, it will not be forced upon the purchaser. (Sec. 798v.)

COMPENSATION AND DAMAGES.

It may be stated as a general proposition that for breaches of contract and other wrongs and injuries cognizable at law, courts of equity do not entertain jurisdiction to give redress by way of compensation or damages where these constitute the sole objects of the bill. (Sec. 794.)

Wherever the matter of the bill is merely for damages, and there is a perfect remedy therefore at law, it is far better that they should be ascertained by a jury, than by the conscience of an equity judge.

Compensation or damages will, ordinarily, be decreed in equity only as incidental to other relief sought by the bill and granted by the court, or where there is no adequate remedy at law.

The mode in which such damages are ascertained is either by a reference to a master or by directing an issue, *quantum damnificatus*, which is trial by a jury. (Sec. 795.)

INTERPLEADER.

The jurisdiction of a court of equity to compel an interpleader follows to some extent the analogies of the law. (Sec. 806.)

Interpleader is applied to cases where two or more persons claim the same debt, duty, or thing, from another, by different or separate interests, and he, not insisting upon any right in the matter, and not knowing to which of the claimants he ought rightly to render such debt, duty, or thing, but fearing that he may suffer injury from their conflicting claims, can file a bill of interpleader, which is in its nature an original bill for relief.

Generally, the bill should be filed before any judgment at law settling the right of the respective parties to the property in question, the object of the bill being to protect the complainant from the vexation attendant upon defending all the suits that may be instituted against him for the same property.

If an interpleader at law will lie in the case, and it would be effectual for the protection of the party, then the jurisdiction in equity fails. (Sec. 807.)

The true ground upon which the plaintiff comes into equity is that, claiming no right in the subject-matter himself, he is, or may be, vexed by having two legal or other processes, in the names of different persons, going on against him at the same time.

Courts of equity dispose of questions arising upon bills of interpleader in various modes, according to the nature of the question and the manner in which it is brought before the court.

BILLS QUIA TIMET.

Bills in equity, *quia timet*, are in the nature of bills of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. (Sec. 826.)

The party seeks the aid of a court of equity because he fears, *quia timet*, some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief.

The manner in which this aid is given by courts of equity is dependent upon circumstances. They interfere sometimes by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given or money to be paid over, and sometimes by the mere issuing of an injunction or other remedial process.

The appointment of a receiver, when directed, is made for the benefit and on behalf of all the parties in interest, and not for the benefit of the plaintiff, or of one defendant only. (Sec. 829.)

The appointment of a receiver is a matter resting in the sound discretion of the court, and the receiver, when appointed, is treated as virtually an officer and representative of the court, and subject to its orders. (Sec. 831.)

A receiver, when in possession, has very little discretion allowed him, but he must apply from time to time to the court for authority to do such acts as may be beneficial to the estate. Thus, he is not at liberty to bring or to defend actions, or to let the estate, or lay out money, unless by the special leave of the court. (Sec. 833a.)

Where a receiver is appointed, and the property is in possession of a third person, who claims he has a right to retain it, the receiver must either proceed by a suit, in the ordinary way, to try his rights to it, or the plaintiff in equity should make such third person a party to the suit, and apply to the court to have the receivership extended to the property in his hands. (Sec. 833b.)

It is not infrequent for a bill, *quia timet*, to ask for the appointment of a receiver against a party who is rightfully in possession, or who is entitled to possession of the fund, or who has an interest in its due administration. (Sec. 835.)

But equity will not withdraw the fund from him by the appointment of a receiver unless the facts averred and established in proof show that there has been an abuse, or is danger of abuse on his own part.

Thus, whenever the appointment of a receiver is sought against an executor or administrator, it is necessary to establish, by suitable proofs, that there is some positive loss, or danger of loss, of the funds, as, for instance, some waste or misapplication of the funds, or some apprehended danger from the bankruptcy insolvency, or personal fraud, misconduct, or negligence, of the executor or administrator. (Sec. 886.)

So, where the tenants of particular estates for life, or in tail, neglect to keep down the interest due upon incumbrances upon the estates, courts of equity will appoint a receiver to receive the rents and profits, in order to keep down the interest. (Sec. 838.)

It is a rule in equity to follow trust money whenever it may be found in the hands of any person who has not *prima facie* a right to hold it, and order him to bring it into court. (Sec. 840.)

Where there is a future right of enjoyment of personal property, equity will interfere and grant relief upon a bill, *quia timet*, where there is any danger of loss, or deterioration, or injury to it, in the hands of the party who is entitled to the present possession. (Sec. 845.)

There are other cases where a remedial justice is applied in the nature of bills, *quia timet*, as where courts of equity interfere to prevent the waste or destruction of property, *pendente lite*, or to prevent irreparable mischief. But these cases will more properly come under the head of injunctions. (Sec. 851.)

BILLS OF PEACE.

By a bill of peace we are to understand a bill brought by a person to establish and repudiate a right which he claims, and which, from its nature, may be controverted by different persons, at different times, and by different actions. (Sec. 853.)

Bills of peace sometimes bear a resemblance to bills *quia timet*. But the latter, however, are quite distinguishable

from the former in several respects, and are always used as a preventive process before a suit is actually instituted; whereas bills of peace, although sometimes brought before any suit is instituted to try a right, are most generally brought after the right has been tried at law. (Sec. 852.)

The obvious design of such a bill is to procure repose from perpetual litigation, and, therefore, it is justly called a bill of peace.

It may be resorted to where one person claims or defends a right against many, or where many claim or defend a right against one. In such cases equity interposes in order to prevent a multiplicity of suits. (Sec. 854.)

To entitle a party to maintain a bill of peace it must be clear that there is a right claimed which affects many persons, that a suitable number of parties in interest are brought before the court. (Sec. 857.)

Bills of peace are also applied to cases where the plaintiff has after repeated and satisfactory trials, established his right at law, and yet is in danger of further litigation and obstruction from new attempts to controvert it. (Sec. 859.)

In such cases equity will interfere by perpetual injunction to quiet the possession of the plaintiff, and to suppress future litigation of the right.

INJUNCTIONS.

A writ of injunction may be described to be a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. (Sec. 861.)

The most common form of injunction is that which operates as a *restraint* upon the party in the exercise of his real and supposed rights, and is sometimes called the remedial writ of injunction.

The other form, commanding an act to be done, is

sometimes called the *judicial writ*, because it issues after a decree, and is in the nature of an execution to enforce the same.

The object of this process is generally preventive and protective, rather than restorative, although it is by no means confined to the former. It seeks to prevent a meditated wrong more often than to redress an injury already done. (Sec. 862.)

The granting or refusal of injunctions is a matter resting in the sound discretion of the court, but injunctions are now more liberally granted, than in former times. (Sec. 863.)

The writ of injunction is peculiar to courts of equity, although there are some cases where courts of law may exercise *analogous powers*, such as by the writ of prohibition and estrepement in cases of waste. (Sec. 864.)

Injunctions, when granted on bills, are either temporary, as until the coming in of the defendant's answer, or until the further order of the court, or until the hearing of the cause, or until the coming in of the report of the master; or, they are perpetual, as when they form a part of the decree after the hearing upon the merits, and the defendant is perpetually enjoined from any assertion of a particular right, or perpetually restrained from the doing of a particular act. (Sec. 873.)

Injunctions to stay proceedings at law are sometimes granted to stay trial; or, after verdict, to stay judgment; or, after judgment, to stay execution; or, if the execution has been effected, to stay the money in the hands of the sheriff. (Sec. 874.)

A writ of injunction for these purposes is in no just sense a prohibition to the courts of common law in the exercise of their jurisdiction. It is not addressed to those courts. It does not even affect to interfere with them. The process, when its object is to restrain proceedings at law, is directed only to the parties. It neither assumes any

superiority over the court in which the proceedings are had, nor denies its jurisdiction. (Sec. 875.)

Without a jurisdiction of this sort to control the proceedings, or to enjoin the judgments of parties at law, it is most obvious that equity jurisprudence, as a system of remedial justice, would be grossly inadequate to the ends of its institution. (Sec. 877.)

The great mass of cases in which an injunction is ordinarily applied for, to stay proceedings at law, is where the rights of the party are *wholly equitable* in their own nature, or are incapable, under the circumstances, of being *asserted* in a court of law. (Sec. 882.)

The occasions on which an injunction may be used, to stay proceedings at law, are almost *infinite* in their nature and circumstances. Generally, in all cases where, by accident, or mistake or fraud, or otherwise, a party has an *unfair advantage* in proceedings in a court of law, which must necessarily make that court an instrument of injustice — and it is, therefore, against conscience that he should use that advantage — a court of equity will interfere by injunction. (Sec. 885.)

The injunction is not confined to any one point of the proceedings at law, but it may, upon a proper case being presented to the court, be granted at any stage of the suit. (Sec. 886.)

Injunctions to restrain suits at law are usually spoken of as *common* or *special*. The common injunction is the writ of injunction issued upon and for the default of the defendant in not appearing to answer the bill. It is also granted where the defendant obtains an order for further time to answer or for a commission to take his answer. (Sec. 892.)

All other injunctions granted upon other occasions, or involving other directions, are called *special* injunctions.

It is asserted, as a general rule, that a *defense* cannot be set up as the ground of a bill in equity for injunction which has been fully and fairly tried at law, although it

may be the opinion of a court of equity that the defense ought to have been sustained at law. (Sec. 894.)

But relief will be granted where the defense could not, at the time, or under the circumstances, be made available at law without any laches of the party. (Sec. 894.)

Thus, if a party should recover a judgment at law for a debt, and the defendant should afterwards find a receipt, under the plaintiff's own hand, for the very money in question, the defendant would be relieved by a perpetual injunction.

Relief will not be granted by staying proceedings at law, after a verdict, if the party applying has been guilty of laches in the matter of defense, or might, by reasonable diligence, have procured the requisite proofs before the trial. (Sec. 895.)

If a matter has been already investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. It is more important that an end should be put to litigation than that justice should be done in every case. (Sec. 896.)

When both parties to a suit in a foreign country, are residents within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them, by injunction, to proceed no further in such suit. (Sec. 899.)

But, as an exception to this rule, it is held that the State courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. And the like doctrine has been applied by the State courts to suits and judgments in other American State courts, where the latter are competent to administer the proper relief. (Sec. 900.)

Courts of equity will grant injunctions in cases where the aggrieved party has equitable rights only, and, indeed, it is said that these courts will grant them more strongly where there is a trust estate.

Injunctions are frequently used in cases of waste when the remedy at law is imperfect, or is wholly denied;

when the nature of the injury is such that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and accounts are incidental to proper relief.

Injunctions are also used in cases of nuisances. And nuisances may be of two sorts: first: such as are injurious to the public at large or to public rights; secondly, such as are injurious to the rights and interests of private persons. (Sec. 920.)

In cases of public nuisances, properly so called, an indictment lies to abate them and to punish the offenders. (Sec. 923.)

But an information also lies in equity to redress the grievance by way of injunction.

But the question of nuisance or not must, in cases of doubt, be tried by a jury, and the injunction will be granted or not, as that fact is decided. And the court, in the exercise of its jurisdiction, will direct the matter to be tried upon an indictment, and reserve its decree accordingly.

The ground of this jurisdiction of courts of equity in cases of public nuisances is their ability to give a more complete and perfect remedy than is attainable at law. They can interpose, where the courts of law cannot, to restrain and prevent such nuisances which are threatened, or are in progress, as well as to abate those already existing. (Sec. 924.)

Also by a perpetual injunction, the remedy is made complete through all future time; whereas, an information or indictment at the common law can only dispose of the present nuisance, and for future acts new prosecutions must be brought; and then the remedial justice in equity may be prompt and immediate before irreparable mischief is done; whereas at law nothing can be done, except after a trial and upon the award of judgment.

But courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made upon satisfactory evidence. For if the evidence

be conflicting, and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition. (Sec. 924a.)

In regard to private nuisances, the interference of courts of equity by way of injunction is founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. (Sec. 925.)

A court of equity will restrain acts in violation of an agreement where the injury to the plaintiffs would be irreparable and the recovery of damages at law no adequate redress.

Where the injury is irreparable, as where loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin of property, may or will ensue from the wrongful act or erection — in every such case courts of equity will interfere by injunction. (Sec. 926.)

Cases of a nature calling for the like remedial interposition of equity are : the obstruction or pollution of water-courses, the diversion of streams from mills, the back-flowage on mills, and the pulling down of the banks of rivers, and thereby exposing adjacent lands to inundation. (Sec. 927.)

Courts of equity will also interfere by injunction to restrain adjoining landowners from so digging in the soil of their own land as to endanger their neighbors' buildings. (Sec. 927a.)

These courts also interfere in cases of trespasses — that is to say, to prevent irreparable mischiefs — or to suppress multiplicity of suits and oppressive litigation; and upon the same grounds they interfere in cases of patents for inventions, and in cases of copyrights, to secure the rights of the inventor or author. (Sec. 928.)

Injunctions are also granted to prevent the use of names, marks, letters, or other *indicia* of a tradesman, by which to pass off goods to purchasers as the manufacture of that tradesman when they are not so.

The true ground of enjoining the use of a trademark is that its similarity to plaintiff's was intended by

defendants to give purchasers to understand the goods were the same, and that it would be likely to produce that effect with the majority of purchasers. (Sec. 951h.)

There are many cases in which courts of equity will interfere by injunction to prevent the sale of real estate; as to restrain the vendor from selling to the prejudice of the vendee, pending a bill for the specific performance of a contract respecting an estate. (Sec. 958.)

In like manner sales may be restrained in all cases where they are inequitable, or may operate as a fraud, upon the rights or interests of third persons; as, in cases of trusts and special authorities, where the party is abusing his trust or authority. (Sec. 954.)

Where land is sold with covenant from the grantee, or upon condition that the erections upon it shall be of a prescribed character, the performance of such stipulations will be enforced in equity by restraining any departure from them. (Sec. 956.)

A preliminary injunction is commonly granted upon such conditions as the court deem reasonable and prudent.

No injunction will be granted whenever it will operate oppressively or inequitably, or contrary to the real justice of the case, or where it is not the fit and appropriate mode of redress under all the circumstances of the case, or where it will or may work an immediate mischief or fatal injury. (Sec. 959a.)

It may be said, in relation to special injunctions, that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to their particular cases in which such injunctions shall be granted or withheld, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. (Sec. 959b.)

There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm

of equity, that never ought to be extended unless of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction. If it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court — not of the party who pays for it.

TRUSTS.

A trust, in its enlarged sense, may be defined to be an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof. (Sec. 964.)

The legal owner holds the direct and absolute dominion over the property in the view of the law, but the income, profits, or benefits thereof, in his hands, belong wholly, or in part, to others.

Three things are said to be indispensable to constitute a valid trust: *first*, sufficient words to raise it; *secondly*, a definite subject; *thirdly*, a certain or ascertained object.

For the most part, matters of trust and confidence are exclusively cognizable in courts of equity; there being few cases, except bailments, and rights founded in contract, and remedial by an action of *assumpsit*, and especially by an action for money had and received, in which a remedy can be administered in the courts of law. (Sec. 962.)

It is also said that a trust is where there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of a court of equity.

Trusts constitute a very important and comprehensive branch of equity jurisprudence; and when the remedy in regard to them ends at law, then the exclusive jurisdiction in equity, for the most part, begins.

It is quite probable that those trusts which are exclusively cognizable in courts of equity, were, in their origin, derived from the Roman law. (Sec. 965.)

The statute of frauds, 29 Charles II., ch. 3, sec. 7, which has been generally adopted in this country, requires all declarations or creations of trusts or confidences of any lands, tenements, and hereditaments to be manifested and proved by some writing signed by the party entitled to declare such trusts, or by his last will in writing. (Sec. 972.)

From the terms of the statute it is apparent it does not extend to declarations of trusts of personalty; neither does it prescribe any particular form or solemnity in writing, nor that the writing should be under seal.

Any writing sufficiently evincive of a trust, as a letter, or other writing of a trustee, stating the trust, or any language in writing clearly expressive of a trust intended by the party, although in the form of a desire or a request, or a recommendation, will create a trust by implication.

Uses or trusts, to be raised by any covenant or agreement of a party in equity, must be founded upon some valuable consideration, for courts of equity will not enforce a mere gratuitous gift or a mere moral obligation. (Sec. 973.)

Trusts in real property, which are exclusively cognizable in equity, are in many respects governed by the same rules as the like estates at law, and afford a striking illustration of the maxim, *æquitas sequitur legem*. (Sec. 974.)

Where a trust is created for the benefit of a party, it is not only alienable by him by his own proper act and conveyance, but it is also liable to be disposed of by operation of law *in invitum*, like any other property. (Sec. 974a.)

In general, a trustee is only suable in equity in regard to any matters touching the trust.

It is a general rule in equity that, whenever a trust exists, either by the declaration of the party or by intentment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate and decree the person in whom it is vested (not being a *bona fide* purchaser, for a valuable consideration without notice) to execute the

trust, for it is a rule in equity, which admits of no exception, that a court of equity never wants a trustee. (Sec. 976.)

The power of a trustee over the legal estate or property vested in him, properly speaking, exists only for the benefit of the *cestui que trust*. (Sec. 977.)

What powers may be properly exercised over trust property by a trustee depends upon the nature of the trust, and sometimes upon the situation of the *cestui que trust*. Where the *cestui que trust* is of age, or *sui juris*, the trustee has no right (unless power is given) to change the nature of the estate, as by converting land into money, or money into land, so as to bind the *cestui que trust*. (Sec. 978.)

Trusts are usually divided into *express trusts* and *implied trusts*, the latter comprehending all those trusts which are called *constructive* and *resulting* trusts. (Sec. 980.)

Express trusts are those created by the direct and positive acts of the parties, by some writing, or deed, or will.

Implied trusts are those which are deducible from the nature of the transaction as a matter of clear intention, although not found in the words of the parties; or which are superinduced upon the transaction by operation of law as matter of equity, independent of the particular intention of the parties.

A resulting trust is created by one man furnishing the money to pay the price of land purchased by another, and by agreement of the parties conveyed to the latter for the benefit of the former. (Sec. 982a.)

MORTGAGES.

As to what constitutes a mortgage there is no difficulty whatever in courts of equity, although there may be technical embarrassment in courts of law. (Sec. 1018.)

The particular form or words of the conveyance are unimportant.

It is a general rule, subject to few exceptions, that whenever a conveyance, assignment, or other instrument transferring

an estate is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appear from the same instrument or from any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations thereof.

Parol evidence is admissible in some cases, as in cases of fraud, accident, and mistake, to show that a conveyance, absolute on its face, was intended between the parties to be a mere mortgage or security for money.

The estate of the mortgagee being treated in equity as a mere security for the debt, it follows the nature of the debt. And although where the mortgage is in fee the legal estate descends to the heir, yet, in equity, it is deemed a chattel interest and personal estate, and belongs to the personal representatives as assets.

A mortgage may be created by a conditional deed, as well as by a conveyance and mortgaging back. And the assignee of a mortgage takes it subject to all the equities which existed as against the mortgagee. (Sec. 1018d.)

Mortgages may not only be created by the express deeds and contracts of the parties, but they may also be *implied*, in equity, from the nature of the transactions between the parties, and then they are termed equitable mortgages. (Sec. 1020.)

In equity, whatever property, personal or real, is capable of absolute sale, may be the subject of a mortgage. (Sec. 1021.)

Mortgages are often given to secure future advances, and in such cases, where the mortgagee has notice of the subsequent mortgage, he cannot hold his security for advances made after such notice. (Sec. 1023a.)

A mortgage of personal property differs from a pledge. The former is a conditional transfer or conveyance of the property itself; and, if the condition is not fully performed, the whole title vests absolutely, at law, in the mortgagee, exactly as it does in the case of a mortgage of lands. The latter only passes the possession, or, at most

a special property only to the pledgee, with a right of retainer until the debt is paid. (Sec. 1030.)

In mortgages of personal property there exists, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor. But there is a difference between mortgages of land and mortgages of personal property in regard to the rights of the mortgagee after a breach of the condition. In the latter case the mortgagee, upon due notice, may sell the personal property mortgaged without a bill of foreclosure. (Sec. 1031.)

It is said that goods pledged or leased by the defendant in execution may be levied upon, subject to the rights of the pawnee or lessee. (Sec. 1035b.)

The satisfaction of the principal debt, by payment or otherwise, will be deemed in equity an extinguishment of the mortgage unless there is an express or implied contract for keeping alive the original security. (Sec. 1035c.)

An extinguishment of the debt will also ordinarily take place where the mortgagee becomes also the absolute owner of the equity of redemption, for then the equitable estate becomes merged in the legal.

When the mortgage debt is once paid off the security is so effectually extinguished that it cannot be made a continuing security for further advancements. (Sec. 1035d.)

ASSIGNMENTS.

Courts of equity take notice of assignments of property, and enforce the rights growing out of the same, in many cases where such arrangements are not recognized at law as valid or effectual to pass titles. (Sec. 1039.)

It is a well-known rule of the common law that no possibility, right, title, or *thing in action*, can be granted to a third person; for it was thought that a different rule would be the occasion of multiplying contentions and suits, as it would, in effect, be transferring a law suit to a stranger.

Hence, at common law, the assignment of a chose in action could not be made so as to vest in the assignee a right of action in his own name. And this, with the exception of negotiable instruments, and some few other securities, still continues to be the general rule unless the debtor assents to the transfer.

But courts of equity totally disregard this nicety. They give effect to assignments of trusts and possibilities of trusts, and contingent interests, and expectancies, whether they are in real or personal estate, as well as to assignments of choses in action. (Sec. 1040.)

Every such assignment is considered in equity as amounting to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt or reduce the property into possession.

In some of the States the common law rule has been relaxed, and all choses in action, such as bonds, mortgages, notes, judgments, debts, contracts, agreements—as well relating to personal as real estate—are assignable, and will pass to the assignee a right of action in the name of the assignee.

In order to constitute an assignment of a debt or other chose in action, in equity, no particular form is necessary; and an assignment of a debt may be by parol as well as by deed. (Sec. 1047.)

A draft drawn by A on B, in favor of C, for a valuable consideration, amounts to a valid assignment to C of so much of the funds of A in the hands of B.

Indeed, any order, writing or act, which makes an appropriation of a fund amounts to an assignment of that fund.

As the assignee is generally entitled to all the remedies of the assignor, so he is generally subject to all the equities between the assignor and his debtor.

In order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for, otherwise, a priority

of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignor before such notice.

In cases of assignments of a debt where the assignor has collateral security therefor, the assignee will be entitled to the full benefit of such securities unless it is otherwise agreed between the parties. (Sec. 1047a.)

It is principally in cases of assignments that courts of equity have occasion to examine the doctrine of *champerty* and *maintenance*. (Sec. 1048.)

Where there is no contract to have a part of the thing in suit, the party so intermeddling is said to be guilty of maintenance. But if the party stipulates to have part of the thing in suit, his offense is called *champerty*.

Courts of equity are ever solicitous to enforce all the principles of law respecting *champerty* and *maintenance*; and they will not, in any case, uphold an assignment which involves any such offensive ingredients. (Sec. 1049.)

WILLS.

The construction of wills often presents embarrassing questions, which call for the interposition of courts of equity to expound.

In equity executors and administrators are considered as trustees, and the persons to whom bequests are made, as the *cestuis que trust*, and in that character are peculiarly entitled to the protection of courts of equity.

Incidental to the jurisdiction over trusts is the duty of giving the true constructions of wills, and of compelling their execution by the executors, or other persons to whom a duty in relation thereto is confided.

The cardinal rule in the construction of wills is that the intention of the testator is to govern, if consistent with the rules of law—that is the testator cannot create a trust which the law prohibits, or suspend the power of alienation, or

the absolute ownership of property, beyond the period allowed by law.

The testator is to be presumed to have used words in their natural or primary sense, unless there is something in the situation of the family or in his will to lead to a contrary conclusion.

He is not bound to use any particular form of words to devise or bequeath a legal interest in property, or to designate the objects of his bounty, provided he uses language sufficient to show his intention.

The intention of the testator is to be ascertained from the whole will taken together, and not from the language of any particular provision or clause when taken by itself.

For the purpose of construction a will and a codicil may be considered together, and construed as different parts of the same will.

The word "and" may be understood disjunctively for "or," and "or" for "and" when it is clear such was the intention of the testator.

The construction will be most favored which will prevent a total failure of a bequest, if *specific*, and the intent is to be gathered from the words of the will itself.

Where the language employed in a will is obscure or ambiguous, and words are made use of in one connection with a meaning apparently at variance with the sense of the same words in another clause, *extrinsic circumstances* may be resorted to for the purpose of aiding the court in arriving at the intention of the testator.

In such a case, the situation of the testator's property, the condition of his family, and the apparent beneficiaries may be considered as landmarks to guide the court in the duty of interpretation.

But extrinsic evidence is inadmissible to influence the construction of a will, when the language, is clear, and capable of construction by well-settled rules.

Effect should be given to every part of a will, and

no portion is to be disregarded unless entirely repugnant to another portion.

No two wills are in all respects alike. But where the same precise form of expression occurs in a will that has been the subject of some former adjudication, unaffected by any different intention in some other part of the will, the courts, with a view to certainty and stability of titles, will follow the judicial precedent.

The intention is to be gathered from the entire instrument; but, rather than sacrifice what is clearly the whole scheme of the testator, incongruous and insensible words must give way.

Where words taken in their technical signification would defeat the testator's intention, as collected from the whole will, a *liberal* and *popular* meaning may be given to them.

Where the intention depends upon words which admit of a twofold construction, one of which would render it void, and the other uphold it, the court will give the latter construction.

One name may be substituted for another, in the construction of a will where it is manifest, not only that the name used was not intended, but that a certain other name was necessarily intended.

The strict grammatical sense is not always regarded, but the words of a will may be transposed to make a limitation sensible, or to carry into effect the general intent of the testator.

The court will abide by the settled meaning of the words until driven out by strong, solid, and rational interpretation put upon, and plain inference drawn from, the rest of the will.

If the language admits of two constructions, one reasonable and natural, and the other less so, the court will adopt the former.

It sometimes happens in wills that there are clauses inconsistent with each other, in which both

cannot take effect. In analogy to the fact that the last will of a testator is to prevail in preference to an earlier one, the courts treat the subsequent words in the will as indicating a subsequent intention, unless there be other expressions of the will which make it apparent that the *first* should take effect.

Sometimes a will is *ambiguous* in its terms, and the true construction of it cannot be made without the aid of a court of equity. The question then arises whether the ambiguity can be explained by resort to parol evidence, or whether it must be determined solely by a resort to other parts of the will.

Ambiguities are of two sorts: one is called a *latent* and the other a *patent* ambiguity.

The first occurs where the deed or instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by evidence of something extrinsic, or some collateral matter out of the instrument.

A latent ambiguity, which is raised by extrinsic evidence, may be explained in the same manner. Thus, if a person grant his manor of S to one of his heirs, so far there appears no ambiguity; but if it should be proved that the grantor has the manors both of South S and North S, this ambiguity is matter of fact, and parol evidence may be admitted to show which of the two manors the party intended to convey.

A patent ambiguity is such as appears on the face of the instrument itself.

In cases of patent ambiguities the apparent uncertainty may be removed by collecting the general intention from other parts of the instrument, so as to make the whole consistent; and this is a legitimate mode of explaining the ambiguity.

But when, after comparing the several parts of a written instrument, and collecting all the lights which *the writing itself supplies*, the intention of the parties still appears to be un-

certain, parol evidence of their intention is not admissible.

If any devise is expressed doubtfully and with uncertainty, the only construction which it is capable of receiving is by comparing it with other parts of the will; and declarations of the testator are not admissible to remove the apparent ambiguity or to explain his intention.

The rule which excludes parol evidence to explain a patent ambiguity in a deed or will should not be carried to the extent of shutting out evidence of the situation and circumstances of the parties, for the purpose of assisting them in putting a construction on wills that are not clearly expressed.

A latent ambiguity sometimes relates to the person of the legatee, and sometimes to the subject of the bequest; but, in either case, if the doubt be created by extrinsic evidence, it may be removed in the same way.

The reason of the rule which excludes parol evidence to explain a patent ambiguity is that the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averment, and so in effect, to make that pass without deed which the law appoints shall not pass but by deed.

Ambiguity of language is, however, to be distinguished from unintelligibility and inaccuracy; for words cannot be said to be ambiguous unless their signification seem doubtful and uncertain to persons of competent skill and knowledge to understand them.

The general presumption is that the testator expects the words of his will to speak from his death. A different construction will not therefore be admitted unless very obviously intended. (Sec. 1074b.)

Upon the construction of wills we are not much assisted by a reference to cases unless the will, or the

words used, are very similar. If this is not so they are more likely to mislead than to assist in coming to a correct conclusion. (Sec. 1074f.)

ELECTION.

Election, in the sense here used, is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both. (Sec. 1075.)

Every case of election presupposes a plurality of gifts or rights, with an intention express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefits of both.

Thus, if a testator should, by his will, give to a legatee an absolute legacy of ten thousand dollars, or an annuity of one thousand dollars per annum during his life, at his election, it would be clear that he ought not to have both, and should be compelled to make an election. (Sec. 1076.)

Election may be: first, *express and positive*; secondly, *implied and constructive*.

Courts of equity adopt the rational exposition of the will — that there is an implied condition that he who accepts a benefit under the instrument, shall adopt the whole, conforming to all its provisions, and renouncing every right inconsistent with it. (Sec. 1077).

The doctrine of election is equally applicable to all interests, whether they are immediate or remote, vested or contingent, of value or of no value, and whether these interests are in real or personal estate.

SATISFACTION.

Satisfaction may be defined in equity to be the donation of a thing, with the intention, express or implied, that it

is to be an extinguishment of some existing right or claim of the donee. (Sec. 1099.)

What is given by a will ought, from the character of the instrument, ordinarily to be deemed as given as a mere bounty, unless a contrary intention is apparent on the face of the instrument. (Sec. 1100.)

But equity has proceeded upon an opposite ground, and the donation is held to be a satisfaction, unless that conclusion is repelled by the nature of the gift, the terms of the will, or the attendant circumstances.

Questions of satisfaction usually come before courts of equity in three classes of cases: *first*, in cases of portions secured by a marriage settlement; *secondly*, in cases of portions given by a will, and an advancement to the donee afterwards in the life-time of the testator; *thirdly*, in cases of legacies to creditors. (Sec. 1109.)

CHARITIES.

Courts of equity take jurisdiction in carrying into effect charitable bequests, however general are the purposes and objects intended, if sufficiently certain to be intelligible, and without regard to the fact of the existence of a trustee capable of holding the legal estate. (Sec. 1154d.)

In carrying into execution a bequest to an individual, the mode in which the legacy is to take effect is deemed to be of the *substance* of the legacy; yet where the legacy is to a charity, the court will consider charity as the substance; and in such cases only, if the mode pointed out fail, it will provide another mode by which the charity may take effect. (Sec. 1167.)

Another principle is that if the bequest be for charity, it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are in *esse*, or not; or whether the legatee be a corporation capable in law of taking or not; or whether the bequest can be carried

into exact execution, or not; for in all these and like cases the court will sustain the legacy. (Sec. 1169.)

Where a literal execution becomes inexpedient, or impracticable, the court will execute it as nearly as it can according to the original purpose, or as the technical expression is, *cy pres*.

The general rule is that if the lands are given to a corporation for any charitable uses, which the donor contemplates to last forever, the heir never can have the land back again. (Sec. 1177.)

When the increased revenues of a charity extend beyond the original objects, the general rule as to the application of such increased revenues is that they are not a resulting trust for the heirs at law, but they are to be applied to similar charitable purposes, and to the augmentation of the benefits of the charity. (Sec. 1178.)

Courts of equity will not transfer the administration of a charity to a new trustee unless there is proof of incapacity or unfaithfulness in the trustee named in the gift; or where there has occurred a failure of the objects of the charity. (Sec. 1178a.)

All these doctrines proceed upon the same ground — that it is the duty of the court to effectuate the general intention of the testator. And, accordingly, the application of them ceases whenever such general intention is not to be found. (Sec. 1182.)

If the testator means to create a trust, and the trust is not effectually created, or fails, the next of kin must take. (Sec. 1183.)

The jurisdiction of a court of equity, with respect to charitable bequests, is derived from its general authority to carry into execution the trusts of a will or other instrument according to the intention expressed in that will or instrument. (Sec. 1187.)

If the trustees of a charity should grossly abuse their trust, a court of equity may go to the length of taking it away from them, and commit the administration of the charity

to other hands. But this is no more than the court will do in proper cases for any gross abuse of other trusts. (Sec. 1191.)

Courts of equity exercise a benign authority in the administration of trusts, to prevent the misapplication of property accumulated for one purpose from being devoted to another and different object.

The cardinal design is to carry out the intent of the donor, when consistent with the rules of law. If the application of the ordinary doctrines of the court works injustice, or if, by the lapse of time or other causes, the public good would be promoted by a diversion of the funds to other objects, in whole or in part, the remedy is with the legislature, and not with the courts.

It should be stated that the *cy pres* doctrine of the English courts of chancery does not exist in all its force, if at all, in the equity courts of some of our States, and that the courts of equity in those States are not clothed with the power, or charged with the duty of devising a scheme of charity, and decreeing its execution, where no scheme was framed by the testator. (Sec. 1176.)

In general, the courts of equity in this country must deal with bequests and trusts for charitable uses, as they deal with bequests and trusts for other lawful purposes, and decide them upon the same principles.

And if the object to be benefited is so indefinite, and so vaguely described, that the bequest or trust cannot be supported in the case of an ordinary trust, it cannot be established in any court of equity on the ground that it is a charity.

IMPLIED TRUSTS.

All trusts are either *express trusts*, which are raised and created by act of the parties, or *implied trusts*, which are raised or created by act or construction of law. (Sec. 1195.)

Express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption.

Implied trusts may be divided into two general classes: *first*, those which stand upon the presumed intention of the parties; *secondly*, those which are independent of such intention, and are forced upon the conscience of the party by operation of law. As, for example, in case of meditated fraud-imposition, notice of an adverse equity, and cases of similar nature.

It is a general rule that a trust is never presumed or implied as intended by the parties, unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions.

Where a man buys land in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person who pays the consideration money. (Sec. 1201.)

As the doctrine of resulting uses and trusts is founded upon a mere implication of law, parol evidence is generally admissible for the purpose of rebutting such resulting use or trust.

But whether, after the death of the supposed nominal purchaser, parol proof alone is admissible against the express declaration of the deed, is not so clear.

Where real estate is purchased for partnership purposes, and on partnership account, it is immaterial, in the view of a court of equity, in whose name or names the purchase is made and the conveyance is taken; it is in equity deemed partnership property, not subject to survivorship; and the partners are deemed the *cestuis que trust* thereof. (Sec. 1207.)

Such real estate, belonging to a partnership, is generally, if not universally, treated as personal property of the partnership.

Generally speaking, whatever is purchased with partnership property, to be used for partnership purposes, is

treated as a trust for the partnership, in whose name the purchase may be made. (Sec. 1207a.)

So, in the case of a purchase of land by a trustee in his own name, in pursuance of the trust, the *cestui que trust* is entitled to the estate. (Sec. 1210.)

In every case where the trust money can be distinctly traced a court of equity will fasten a trust upon the land in favor of the person beneficially entitled to the money.

Whatever acts are done by trustees, in regard to trust property, shall be deemed to be done for the benefit of the *cestui que trust*, and not for the benefit of the trustee. (Sec. 1211.)

If a trustee should misapply the funds of the *cestui que trust*, the latter would have an election either to take the security or other property in which the funds were wrongfully invested, or to demand repayment from the trustee of the original funds.

The same principle will apply to persons standing in other judiciary relations to each other. Thus, for example, if an agent, who is employed to purchase for another, purchases in his own name, or for his own account, he will be held to be a trustee of the principal at the option of another. (Sec. 1211a.)

Another class of cases, illustrating the doctrine of implied trusts, is that which embraces what is commonly called the equitable conversion of property. (Sec. 1212.)

By this is meant an implied or equitable change of property from real to personal, or from personal to real; so that each is transferable and descendible according to its new character, as it arises out of the contracts or other acts and intentions of the parties.

This change is a mere consequence of the common doctrine of courts of equity that, where things are agreed to be done, they are to be treated, for many purposes, as if they were actually done. Thus, where a contract is made for the sale of land, the vendor is, in equity, deemed a trustee

for the vendee of the real estate, and the vendee is decreed a trustee for the vendors of the purchase money.

Under such circumstances the vendee is treated as the owner of the land, and it is descendible as his real estate. And the money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him as other personalty, and is distributable in the same manner, on his death.

Land, articleed to be sold and turned into money, is reputed money; and money, articleed or bequeathed to be invested in land is ordinarily deemed to be land.

Another class of implied trusts arises from what are properly called equitable liens; by which we are to understand such liens as exist in equity, and of which courts of equity alone take cognizance. (Sec. 1215.)

A lien is not, strictly speaking, either a *jus in re*, or a *jus ad rem* — that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.

At law a lien is usually deemed to be a right to possess and retain a thing until some charge upon it is paid or removed. (Sec. 1216.)

Liens at law generally arise either by the express agreement of the parties, or by the usage of trade — which amounts to an implied agreement — or by mere operation of law.

But there are liens recognized in equity whose existence is not known or obligation enforced at law; and in regard to these liens, it may be generally stated that they arise from constructive trusts. (Sec. 1217.)

Such liens, therefore, are wholly independent of the possession of the thing to which they are attached, as a charge or incumbrance, and they can be enforced only in courts of equity.

The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached.

In equity the vendor of land has a lien on the land for the amount of the purchase money, not only against the vendee

himself and his heirs, and other privies in estate, but also against all subsequent purchasers having notice that the purchase money remains unpaid.

Where a conveyance is made prematurely before money paid, the money is considered as a lien on that estate in the hands of the vendee. So, where money is paid prematurely, the money would be considered as a lien on the estate of the vendor for the personal representatives of the purchaser.

The general rule seems to be that the absolute dominion over property sold is not acquired by the purchaser until he has paid the price, or has otherwise satisfied it, unless the vendor has agreed to trust to the personal credit of the buyer; for a thing may well be deemed to be unconscionably obtained when the consideration is not paid. (Sec. 1220.)

Generally speaking, the lien of the vendor exists, and the burden of proof is on the purchaser to establish that, in the particular case, it has been intentionally displaced or waived by the consent of the parties. If, under the circumstances, it remains in doubt, then the lien attaches. (Sec. 1224.)

The taking of a security for the payment of the purchase money is not, of itself, a positive waiver or extinguishment of the lien. (Sec. 1226.)

Where the vendee has sold to a *bona fide* purchaser without notice, if the purchase money has not been paid, the original vendor may proceed against the estate for his lien, or against the purchase money in the hands of such purchaser for satisfaction; for in such case the latter, not having paid his money, takes the estate *cum onere*, at least to the extent of the unpaid purchase money. (Sec. 1232.)

It is also a general rule in equity that where there is a lien upon different parcels of land for the payment of the same debt, and some of those lands still belong to the person who, in equity and justice, owes, or ought to pay, the debt, and other parcels of the land have been transferred by him to

third persons, his part of the land, as between himself and them, shall be primarily chargeable with the debt. (Sec. 1233d.)

Another species of lien is that which results to one joint owner of any real estate, or other joint property, from repairs and improvements made upon such property, for the joint benefit, and for disbursements touching the same. (Sec. 1234.)

The doctrine of contribution in equity is larger than it is at law; and, in many cases, repairs and improvements will be held to be not merely a personal charge, but a lien on the estate itself. (Sec. 1236.)

Thus it is held that if two or more persons make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this will be a *lien* on the land, and a *trust* for the representatives of him who advanced it.

Courts of equity have not confined the doctrine of compensation or lien, for repairs and improvements, to cases of agreement or of joint purchases. They have extended it to other cases, where the party making the repairs and improvements has acted *bona fide* and innocently, and there has been a substantial benefit conferred on the owner, so that, *ex æquo et bono*, he ought to pay for such benefit. (Sec. 1237.)

Thus where a party, lawfully in possession under a defective title, has made permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements.

So, if the true owner stands by, and suffers improvements to be made on an estate without notice of his title, he will not be permitted in equity to enrich himself by the loss of another, but the improvements will constitute a lien on the estate.

In all cases of this sort, however, the doctrine proceeds upon the ground either that there is some *fraud*, or that the aid of a court of equity is required; for if a party can recover the

estate at law, a court of equity will not, unless there is some *fraud*, relieve a purchaser or *bona fide* possessor on account of money laid out in repairs and improvements. (Sec. 1238.)

Generally, all incumbrances upon land descended or devised are made a primary charge upon the lands, and not entitled to exoneration out of the personal estate unless, in the case of a will, there shall be some expression of an intention to that effect.

Where a person becomes entitled to an estate subject to a charge, and then covenants to pay it, the charge still remains primarily on the real estate, and the covenant is only a collateral security, because the debt is not the original debt of the covenantor.

Having considered some of the important classes of *implied trusts* arising from the presumed intention of the parties, we may now pass to the consideration of their implied, or their constructive, trusts, which are independent of any such intention, and are forced upon the conscience of the party by the mere operation of law. (Sec. 1254.)

One of the most common cases in which a court of equity acts upon the ground of implied trusts *in invitum* is where a party has received money which he cannot conscientiously withhold from another party. (Sec. 1255.)

Courts of law entertain jurisdiction in many cases of this sort, where formerly the remedy was solely in equity — as, for example, in an action of *assumpsit* for money had and received, where the money cannot conscientiously be withheld by the party. (Sec. 1256.)

Where a party purchases trust property, knowing it to be such, from the trustee, in violation of the objects of the trust, courts of equity force the trust upon the conscience of the party, compel him to perform it, and to hold the property subject to it. (Sec. 1257.)

It is a general proposition, both at law and in equity, that if any property in its original state and form is covered with a trust in favor of the principal, no change of that

state and form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right (not being *bona fide* purchasers for a valuable consideration without notice), any more valid claim in respect to it than they respectively had before such change. (Sec. 1258.)

Thus, if A is trusted by B with money to purchase a horse for him, and A purchases a carriage with that money, in violation of the trust, B is entitled to the carriage, and may, if he chooses so to do, sue for it at law. (Sec. 1259.)

When a trustee or other person, standing in a fiduciary relation, makes a profit out of any transactions within the scope of his agency or authority, that profit will belong to his *cestui que trust*. (Sec. 1261.)

And one who assumes to act in relation to trust properly without just authority, however *bona fide* may be his conduct, shall be held responsible, both for the capital and the income, to the same extent as if he had been *de jure* trustee. (Sec. 1261c.)

The principle of following trust funds in the hands of a defaulting trustee applies against the assignees of such trustee as fully as against the trustee himself. (Sec. 1261d.)

Wherever a trustee is guilty of a breach of trust by the sale of the trust property to a *bona fide* purchaser for a valuable consideration without notice, and the purchase money has been paid, the trust in the property is extinguished. (Sec. 1264.)

But if afterwards the trustee should repurchase, or otherwise become entitled to, the same property, the trust would revive, for a party shall not, by his own wrongful act, acquire an absolute title to that which he is in conscience bound to preserve for another. In equity, even more strongly than at law, the maxim prevails that no man shall take advantage of his own wrong.

A fraudulent purchaser will be held a mere trustee for the honest, but deluded and cheated, vendor. And a person who lies by, and without notice suffers his own estate

to be sold and incumbered in favor of an innocent purchaser or lender, will be held a trustee of the estate for the latter. (Sec. 1265.)

In general, a trustee is bound by his implied obligation to perform all those acts which are necessary and proper for the due execution of the trust which he has undertaken. (Sec. 1268.)

He would seem upon the analogous principles applicable to bailments, bound only to good faith and reasonable diligence; and, as in the case of a gratuitous bailee, liable only for gross negligence.

The rule is that where a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not made answerable for losses. (Sec. 1269.)

In all cases, however, where a trustee places money in the hand of a banker, he should take care to keep it separate, and not mix it with his own in a common account; for, if he should so mix it, he would be deemed to have treated the whole as his own, and he would be held liable to the *cestui que trust* for any loss sustained by the banker's insolvency. (Sec. 1270.)

Where a trustee has acted in good faith, in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for any losses accruing in the management of the trust property. (Sec. 1272.)

Joint trustees are responsible for the acts of each other, in the misapplication of the trust funds, where they have put the funds in the power of one of their number. (Sec. 1273f.)

The general rule is that if a trustee has made interest upon the trust funds, or ought to have invested them so as to yield interest, he shall, in each case, be chargeable with the payment of interest. The rule in equity is that all the gain shall go to the *cestui que trust*. (Sec. 1277.)

Co-trustees are not responsible for the fraud and forgery

of one of their number, to which they in no way contribute either directly or remotely.

When the trustee makes an improper investment of trust funds he becomes responsible for the same, with interest. (Sec. 1277g.)

Trustees have all equal power, interest, and authority and cannot act separately, as executors may, but must join both in conveyances and receipts. (Sec. 1280.)

Where there are two executors each has a several right to receive the debt due the estate, and all other assets which shall come to his hands and he is consequently solely responsible for the assets which he receives. (Sec. 1280a.)

If they join in a receipt it is their own voluntary act, and equivalent to an admission of their willingness to be jointly accountable for the money.

If an executor knows that the moneys received by his co-executor are not applied according to the trusts of the will, and stands by and acquiesces in it, without doing anything on his part to procure the due execution of the trust, he will, in respect of that negligence, be himself charged with the loss.

It is held that if two executors, guardians, or trustees, join in a receipt for trust money, it is *prima facie*, although not absolutely conclusive, that the money came to the hands of both. Either of them may show, by satisfactory proof, that his joining in the receipt was necessary, or merely formal, and that the money was, in fact, all received by his companion. (Sec. 1283.)

If by any positive act, direction, or agreement, of one joint executor, guardian, or trustee, the trust money is paid over, and comes into the hands of the other, when it might and should have been otherwise controlled or secured by both, then each of them will be held chargeable for the whole. (Sec. 1284.)

If there has been a clear breach of trust by a trustee, yet, if the *cestui que trust*, or beneficiary, has for a long time acquiesced in the misconduct of the trustee, with a

full knowledge of it, a court of equity will not relieve him. *Vigilantibus, non dormientibus, æquitas subvenit.* (Sec. 1284a.)

In general, *concurrence* is required in regard to trusts of a private nature. But in regard to such trusts as are of a public nature the trustees may act by the majority. (Sec. 1284c.)

All trusts which partake of an official character, such as that of executors and administrators in the settlement of estates, may be performed severally, as in the collection of debts.

Where a trust is to be executed, if the parties have become so hostile to each other that they will not act together, or there is positive evidence of misconduct, or such acts of omissions as endanger the trust property, or show a want of honesty or proper capacity to execute the duties of the trust, a court of equity will displace them. (Sec. 1288.)

PENALTIES AND FORFEITURES.

In cases of penalties and forfeitures for breaches of conditions and covenants, there was, originally, no remedy at law; but the only relief which could be obtained was exclusively sought in courts of equity. (Sec. 1301.)

Now, by the operation of statutes made for the purpose, relief may be obtained at law. The original jurisdiction, however, of courts of equity, still remains, notwithstanding the concurrent remedy at law.

At law, and in general, the same is true in equity, if a man undertake to do a thing, either by way of *contract* or by way of *condition*, and it is practical to do the thing, he is bound to perform it, or he must suffer the ordinary consequences — that is to say, if it be a matter of contract, he will be liable at law for damages, for the non-performance; if it be a condition, then his rights, dependent upon the performance for the condition, will be gone by the non-performance. (Sec. 1302.)

The difficulty which arises is to ascertain what shall be

the effect in cases where the contract or condition is impossible to be performed, or where it is against law or repugnant in itself, or to the policy of the law.

Conditions may be divided into four classes: *first*, those which are possible at the time of their creation but afterwards become impossible, either by the act of God or by the act of the party; *secondly*, those which are impossible at the time of their creation; *thirdly*, those which are against law or public policy, or are *mala in se* or *mala prohibita*; *fourthly*, those which are repugnant to the grant or gift by which they are created, or to which they are annexed. (Sec. 1804.)

A general rule of the common law in regard to conditions is, that if they are impossible at the time of their creation, or afterwards become impossible by the act of God, or of the law, or of the party who is entitled to the benefit of them, or if they are contrary to law, or if they are repugnant to the nature of the estate or grant, they are void.

But if they are possible at the time, and become subsequently impossible by the act of the party who is to perform them, then he is treated as *in delicto*, and the condition is valid and obligatory upon him.

At the common law a condition is considered as impossible only when it cannot, by any human means, take effect. (Sec. 1805).

Conditions will have a very different operation where they are conditions precedent from what they will have when they are conditions subsequent. (Sec. 1806.)

Thus if an estate is granted upon a condition subsequent—that is to say, to be performed after the estate is vested—and the condition is void for any of the causes just stated, there the estate becomes absolute.

But if the condition is precedent, or to be performed before the estate vests, there, the condition being void, the estate which depends thereon is void also, and the grantee shall take nothing by the grant, for he hath no estate until the condition is performed.

It is obvious that if a condition or covenant was pos-

sible to be performed, there was an obligation on the party at the common law to perform it punctiliously. If he failed so to do, it was wholly immaterial whether the failure was by accident, or mistake, or fraud, or negligence, his responsibility dependent upon it became absolute. (Sec. 1311.)

Courts of equity, however, do not hold themselves to such rigid rules, but they are accustomed to administer as well as to refuse, relief in many cases of this sort upon principles peculiar to themselves. (Sec. 1312.)

In the first place, as to relief in cases of penalties annexed to bonds and other instruments, the design of which is to secure the due fulfillment of the principal obligation, the general principle adopted is that wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damages really incurred by the non-performance. (Sec. 1313.)

If the penalty is to secure the mere payment of money, courts of equity will relieve the party upon paying the principal and interest.

The foundation of this relief in equity is that, as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expected, and all that in justice he is entitled to. (Sec. 1316.)

The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury.

But we must carefully distinguish between cases of penalties, strictly so called, and cases of liquidated damages. (Sec. 1318.)

Cases of liquidated damages occur when the parties have agreed that, in case one party shall do a stipulated act,

or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conventional amount of the damages sustained by such act or omission.

In cases of this sort courts of equity will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages, provided the damages do not assume the character of gross extravagance, or of wanton and unreasonable disapprobation to the nature and extent of the injury.

It is a universal rule in equity never to enforce either a penalty or a forfeiture. Therefore courts of equity will never aid in the divesting of an estate for a breach of a covenant, or a condition subsequent, although they will often interfere to prevent the divesting of an estate for a breach of covenant or condition. (Sec. 1319.)

Where a party or his agent who is entitled to the benefit of the forfeiture has waived such a benefit, and treated the contract as still subsisting for some purpose, he will not be allowed to insist upon the forfeiture for any purpose. (Sec. 1325a.)

And where any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act, courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will to grant relief in such cases. (Sec. 1326.)

INFANTS.

Whatever may be the true origin of the jurisdiction of courts of equity over the persons and property of infants, it is now conceded on all sides to be firmly established, and beyond the reach of controversy. (Sec. 1337.)

Courts of equity will appoint a suitable guardian to an infant when there is none other, or none other who will or can act, at least where the infant has property; for if the infant has no property the court will perhaps not interfere. (Sec. 1338.)

Guardians appointed by the court are treated as officers of the court, and are held responsible accordingly to it.

Courts of chancery will not only remove guardians appointed by their own authority, but will also remove guardians at the common law, and even testamentary or statute guardians, whenever sufficient cause can be shown for that purpose. (Sec. 1889.)

The court will, upon special application, interfere and regulate and direct the conduct of the guardian in regard to the custody and education and maintenance of the infant, and, if necessary, will inhibit him from carrying the infant out of the country, and will even appoint the school where he shall be educated.

The jurisdiction extends to the care of the person of the infant, so far as necessary for his protection and education, and as to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance. (Sec. 1841.)

It is only in cases of gross misconduct that paternal rights are interfered with. And, as between husband and wife, the custody of the children generally belongs to the husband.

If the infant be a daughter, and of very tender years, and the mother, under all the circumstances, is the most suitable to take care of her person and education, a court of chancery will confer the custody on the mother; while, if the infant is of riper years and more discretion, and especially if a son, he would be entrusted for his education and superintendence to the custody and care of his father, if no real objection to his character and conduct existed. (Sec. 1841a.)

The jurisdiction to remove infant children from the custody of their parents, and to superintend their education and maintenance, is admitted to be of extreme delicacy; but it is a jurisdiction which seems indispensable

to the sound morals, the good order, and the just protection of civilized society. (Sec. 1342.)

Equity will only apply the income of the estate of the infant towards his support and education when the father is not of sufficient ability, or in some other exceptional cases, as where it is desirable to educate the infant with a view to establishment in life beyond that which the law requires of the father. (Sec. 1347f.)

A court of equity acts throughout with all the anxious care and vigilance of a parent, and it allows neither the guardian, nor any other person, to do any act injurious to the rights or interests of the infant.

In allowing maintenance, the court usually confines itself within the limits of the income of the property. But where the property is small, and more means are necessary for the due maintenance of the infant, the court will sometimes allow the capital to be broken in upon. (Sec. 1355.)

If a man intrudes upon the estate of an infant and takes the profits thereof he will be treated as a guardian, and held responsible therefor to the infant in a suit in equity. (Sec. 1356.)

Guardians will not ordinarily be permitted to change the personal property of the infant into real property, or the real property into personalty, since it may not only affect the rights of the infant himself, but also of his representatives if he should die under age. (Sec. 1357.)

When a court directs any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it if it had remained in its original state.

MARRIED WOMEN.

At common law, husband and wife are treated, for most purposes, as one person — that is to say, the very being or legal existence of the woman as a distinct person is

suspended during the marriage, or, at least, is incorporated and consolidated with that of her husband. (Sec. 1367.)

For this reason, if the wife be injured in her person or property during the marriage, she can bring no action for redress without the concurrence of her husband, neither can she be sued without making her husband also a party in the cause.

Courts of equity, however, for many purposes, treat the husband and wife as the *civil law* treats them — as distinct persons, capable, in a limited sense, of contracting with each other, of suing each other, and of having separate estates, debts, and interests. (Sec. 1368.)

By the general rules of *law* the contracts made between husband and wife before marriage become by the matrimonial union, utterly extinguished. (Sec. 1370.)

But courts of equity, although they generally follow the same doctrine, will, in special cases, in furtherance of the manifest intentions and objects of the parties, carry into effect such a contract, made before marriage between the husband and wife, although it would be avoided at law; for equity will not suffer the intention of the parties to be defeated by the very act which is designed to give effect to such a contract.

As to contracts made between husband and wife after marriage, the principles of the common law apply to pronounce them a mere nullity; for there is deemed to be a positive incapacity in each to contract with the other. (Sec. 1372.)

But here again, although courts of equity *follow the law* they will, under particular circumstances, give full effect and validity to post nuptial contracts.

So, in equity, a wife may become a creditor of her husband by acts and contracts during marriage, and her rights as such will be enforced against him and his representatives. (Sec. 1373.)

In respect to gifts or grants of property by a husband to his wife after marriage, they are ordinarily, but not uni-

versally, void at law. But courts of equity will uphold them in many cases where they would be held void at law, although in other cases the rule of law will be recognized and enforced. (Sec. 1374.)

In some of the States the equitable rights of married women, which have been for over a century enforced only in courts of equity, are now, as the direct result of remedial legislation, changed into legal rights, and the common law courts, by virtue of the statute law, afford as complete protection to married women as they have ever enjoyed in the equity courts.

Indeed, in some of the States the rights of married women over their separate estates have been carried far beyond the established principles of these courts, and a *feme covert* is now permitted *at law* to dispose of her own property at pleasure without the assent of her husband, and may enter into contracts, and sue and be sued in her own name, as fully as if she were single.

Thus, in respect to the separate estate of the wife, most all of the old common law disabilities of coverture, originating in the feudal system, have been swept away, just as the most oppressive of the feudal terms were extirpated and demolished by the memorable statute 12, Charles II. All of the States, however, have not advanced as far as this in overturning the common law rules governing the marital relation, and it is safe to say that no two States have legislated alike upon the subject.

BILLS OF DISCOVERY.

Every bill in equity may properly be deemed a bill of discovery, since it seeks a disclosure from the defendant, on his oath, of the circumstances constituting the plaintiff's case as propounded in his bill. (Sec. 1483.)

But that which is usually called a bill of discovery is a bill which asks no relief, but which simply seeks the discovery of the facts resting in the knowledge of the de-

defendant, or the discovery of deeds, or writing, or other things in the possession or power of the defendant, in order to maintain the right or title of the party asking it in some suit or proceeding in another court.

The sole object of such a bill, then, being a particular discovery, when that discovery is obtained by the answer, there can be no further proceedings thereon.

To maintain a bill of discovery it is not necessary that the party should otherwise be without any proof of his case, for he may maintain such a bill either because he has no proof, or because he wants it in aid of other proof.

In general, it seems necessary, in order to maintain a bill of discovery, that an action should be already commenced in another court, to which it should be auxiliary; still, it is not always essential.

It must clearly appear upon the face of the bill that the plaintiff has a title to the discovery which he seeks, or that he has an interest in the subject-matter to which the discovery is attached, capable and proper to be indicated in some judicial tribunal. (Sec. 1490.)

He must also state a case which will, if he is the plaintiff at law, constitute a good ground of action, or, if he is the defendant at law, show a good ground of defense, in aid of which the discovery is sought. (Sec. 1493a.)

The substantial requisites of a bill for discovery which must be alleged therein are not that the plaintiff has a good cause of action, or defense, as the case may be; that he is without proof, except from the testimony of the defendants in the bill, whose testimony he cannot obtain except in this mode, and that he expects by such testimony to establish his case. (Sec. 1493b.)

Courts of equity will not entertain a bill for a discovery, to aid the promotion or defense of any suit which is not purely of a civil nature. Thus, for example, they will not compel a discovery in aid of a criminal prosecution, or of a penal action, or of a suit in its nature partaking of such a character. (Sec. 1494.)

And equity will not entertain a bill for a discovery to assist a suit in another court, if the latter is of itself competent to grant the same relief, for in such a case the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is pending. (Sec. 1495.)

A defendant may object to a bill of discovery that he is a *bona fide* purchaser of the property for a valuable consideration, without notice of the plaintiff's claim. (Sec. 1502.)

But to entitle himself to protection the purchaser must not only be a *bona fide* purchaser without notice, and for a valuable consideration, but he must have also paid the purchase money.

Even the purchaser of an equity is bound to take notice of, and is bound by, a prior equity, and between equities the established rule is that he who has the prior equity in point of time is entitled to the like priority in point of right.

The rule in equity is that if a defendant has in conscience a right equal to that claimed by the person filing a bill against him, although he is not clothed with a perfect legal title, this circumstance, in his situation as defendant, renders it improper for a court of equity to compel him to make a discovery which may hazard his title.

BILLS TO PERPETUATE TESTIMONY are also entertained by courts of equity. The object of such bills is to preserve and perpetuate testimony when it is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation. (Sec. 1505.)

Bills of this sort are indispensable for the purposes of public justice, as it may be utterly impossible for a party to bring his rights presently to a judicial decision and unless in the intermediate time he may perpetuate the proofs of those rights, they may be lost without any default on his side.

The equity courts do not generally entertain bills to perpetuate testimony for the purpose of being used upon a

future occasion, unless where it is absolutely necessary to prevent a failure of justice. (Sec. 1507.)

If, therefore, it be possible that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to perpetuate testimony, courts of equity will not entertain any bill for the purpose. (Sec. 1508.)

As to the right to maintain a bill to perpetuate testimony, there is no distinction, whether it respects title or claim to real estate, or to personal estate, or to mere personal demands; or whether it is to be used as a matter of proof in support of the plaintiff's action, or as a matter of defense to repel it. (Sec. 1509.)

If the bill is sustained, and the testimony is taken, the suit terminates with the examination; and, of course, is not brought to a hearing. (Sec. 1512.)

The decretal order of the court granting the commission directs that the depositions when taken shall remain to perpetuate the memory thereof, and to be used, in case of the death of the witnesses or their inability to travel, as there shall be occasion.

PECULIAR DEFENSES AND PROOFS.

There are some defenses which are peculiar to courts of equity, and are unknown to courts of common law. So, also, there are some peculiarities in relation to evidence unknown to the practice of the latter courts, which yet lie at the very foundation of the practice of the former. (Sec. 1519.)

The statutes of limitations, where they are addressed to courts of equity, as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction at law and in equity, are equally obligatory on each court. (Sec. 1520.)

Thus, for example, if a legal title would, in ejectment, be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases

of relief sought upon equitable titles or claims touching real estate.

So, if the judgment creditor has lain by for twenty years, without any effort to enforce his judgment, and it has not been acknowledged by the debtor within that time, it will be presumed to be satisfied.

And in all these cases courts of equity will act upon these facts as a positive bar to relief in equity, for these courts have always refused their aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call these courts into activity but conscience, good faith, and reasonable diligence.

A court of equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished. (Sec. 1520c.)

The personal representative is affected by the delay or acquiescence of the decedent to the same extent as if it were his own. But acquiescence without full knowledge of the facts cannot affect the rights of any one. (Sec. 1520d.)

Courts of equity not only act in obedience and in analogy to the statute of limitations in proper cases, but they also interfere in many cases to prevent the bar of the statutes when it would be inequitable or unjust. (Sec. 1521.)

Thus, for example, if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, equity will interpose and remove the bar out of the way of the other injured party.

In general, it may be said that the rule of courts of equity is that the cause of action or suit arises when and as soon as the party has a right to apply to a court of equity for relief. (Sec. 1521a.)

In cases of fraud or mistake the bar of the statute of limitations begins to run from the time of the discovery of such fraud or mistake, and not before.

An acknowledgment of a debt or judgment, to take

the case out of the statute of limitations, or bar by lapse of time, must be made, not to a mere stranger, but to the creditor, or some one acting for him and upon which the creditor is to act or confide.

It is a rule both at law and in equity that an indorsement upon a promissory note, or other written evidence of debt, in order to take the case out of the statute of limitations, if made by the creditor, or holder, must be shown to have been made, before the statutory bar took effect. (Sec. 1521b.)

Where one indebted on three promissory notes was applied to for payment on account of interest and paid £5, and at this time two of the notes were barred by the statute of limitations, it was held that the payment must be considered as made exclusively upon the note not barred, and its effect was to prevent the operation of the statute as to that note.

A devise in trust to pay the debts of the devisor will remove the bar of the statute of limitations.

It is on the ground of part performance, and to prevent fraud, that the courts of equity are enabled to treat an absolute deed, given to secure a debt, as a mortgage where the condition of defeasance rests in parol merely. (Sec. 1522a.)

A former decree in a suit in equity between the same parties, and for the same subject-matter is also a good defense in equity, even although it be a decree merely dismissing the bill, if the dismissal is not expressed to be without prejudice. (Sec. 1523.)

The want of proper parties to a bill is also a good defense in equity at least until the new parties are made, or a good reason shown why they are not made.

It is the great object of courts of equity to put an end to litigation, and to settle, if possible, in a single suit, the rights of all parties interested or affected by the subject-matter in controversy.

Hence, the general rule in equity is that all persons

are to be made parties who are either legally or equitably interested in the subject-matter and result of the suit, however numerous they may be, if they are within the jurisdiction, and it is, in a general sense, practicable to do so.

In general, it may be stated that the rules of evidence are the same in equity as they are at law, and that questions of the competency or incompetency of witnesses, and of other proofs, are also the same in both courts. (Sec. 1527).

Almost all testimony is positively required by courts of equity, to be by written deposition; the admission of *viva voce* evidence at the hearing being limited to a very few cases, such as proving a deed or a voucher referred to in the case.

The same general rule prevails in equity as at law that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments, and the interpretation of them must depend upon their own terms. But in cases of accident, mistake or fraud, courts of equity are constantly in the habit of admitting parol evidence to qualify and correct, and even defeat the terms of written instruments. (Sec. 1531.)

ESTOPPEL IN EQUITY.

The subject of equitable estoppels, or estoppels in fact, applies to all cases, where rights once valid are lost by delay, and the implied acquiescence resulting from such delay. (Sec. 1534.)

Lapse of time and acquiescence on the part of the party whose interests are alleged to have been injuriously affected by irregular proceedings will be a complete bar, unless the transaction is tainted with fraud, meaning thereby an act involving grave moral guilt.

In cases of actual fraud courts of equity feel great reluctance to interfere where the party complaining does not apply for redress at the earliest convenient moment after the fraudulent character of the transaction comes to his knowledge.

Upon similar grounds courts refuse to disturb settlements long acquiesced in, although between parties holding confidential relations to each other, and of such a nature as to give one great advantage over the other in making such settlements; as, for instance, between trustee and *cestui que trust*.

The equitable rule as to the effect of a person lying by, and allowing another to expend money on his property, does not apply where the money is expended with knowledge of the real state of the title. (Sec. 1537.)

Where a party, by misrepresentation, draws another into a contract, he may be compelled to make good the representation, if that be possible; but if not, the other party may avoid the contract. (Sec. 1538.)

And the same principle applies, although the party making the representation believed it to be true, if, in the due discharge of his duty, he ought to have known the fact.

Third parties who, by false representations, induce others to enter into contracts are estopped from afterwards falsifying their statements, and, if necessary, may be compelled to make them good. But where a contract is entered into upon the false statement of one not a party, it is no ground of avoiding the contract.

Misrepresentation may be either by the suppression of truth or the suggestion of falsehood; but to be the ground for avoiding the contract, it must be such that it is reasonable to infer that in its absence the party deceived would not have entered into the contract.

The doctrine of estoppel *in pais*, or equitable estoppels, is based upon a fraudulent purpose and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel. (Sec. 1548.)

As if both parties were equally conscious of the facts, and the declaration or silence of one party produced no change in the conduct of the other, he acted solely upon his own judgment.

It is the universal law that if a man, either by

words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct. (Sec. 1546.)

It is equally true that if a party has an interest to prevent an act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it been done by his previous license.

And here we must bring this abridgment of equity jurisprudence to a close. But, to use the language of Mr. Justice Story, let not the ingenuous youth imagine that he also may here close his own preparatory studies of equity jurisprudence, or content himself, for the ordinary purposes of practice, with the general survey which has thus been presented to his view. What has been here offered to his attention is designed only to open the paths for his future inquiries; to stimulate his diligence to wider and deeper and more comprehensive examinations; to awaken his ambition to the pursuit of the loftiest objects of his profession, and to impress him with a profound sense of the ample instruction and glorious rewards which await his future enterprise and patient devotion in the study of the *first of human sciences*—THE LAW.

**CONSTITUTION OF THE
UNITED STATES OF AMERICA.**

CONSTITUTION OF THE UNITED STATES OF AMERICA.

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Preamble.—We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION FOR THE UNITED STATES OF AMERICA.

ARTICLE I.**OF THE LEGISLATIVE POWER.**

SECTION 1. Legislative power, where vested.—All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SEC. 2. House of Representatives, how and by whom chosen.—The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

Qualification of Representative.—No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Apportionment of Representatives and direct taxes—census.—Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such a manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

Vacancies in House of Representatives. — When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

Speaker and officers of House — impeachment. — The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. Senators — election and term of. — The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each senator shall have one vote.

Division into classes — vacancies — qualifications. — Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and

who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

Vice-President.—The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

President pro tem. and other officers of Senate.—The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

Impeachment, power to try—presiding officer on trial.—The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment on impeachment.—Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment and punishment, according to law.

SEC. 4. Election of Senators and Representatives—sessions of Congress.—The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day.

SEC. 5. Qualification of members—judge of, quorum. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to com-

pel the attendance of absent members, in such manner and under such penalties as each house may provide.

Rules of proceedings—contempts, expulsions.—Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Journals—yeas and nays.—Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Adjournments.—Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. Compensation of members—privileges.—The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

Ineligibility to office.—No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SEC. 7. Revenue bills—where to originate.—All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Bills, approval of President—veto, proceedings

thereon. — Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Orders, resolutions and votes — President's approval, veto. — Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Sec. 8. Powers of Congress. — The Congress shall have power:

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

- To regulate commerce with foreign nations, and among the several States, and with the Indian tribes ;
- To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States ;
- To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures ;
- To provide for the punishment of counterfeiting the securities and current coin of the United States ;
- To establish postoffices and post roads ;
- To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries ;
- To constitute tribunals inferior to the supreme court ;
- To define and punish piracies and felonies committed on the high seas ; and offenses against the law of nations ;
- To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water ;
- To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years ;
- To provide and maintain a navy ;
- To make rules for the government and regulation of the land and naval forces ;
- To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions ;
- To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress ;
- To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to execute like authority over all places purchased by the consent of the legislature of the State in

which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Sec. 9. Migration and importation of persons. — The migration and importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

Writ of habeas corpus. — The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.

Bills of attainder and ex post facto laws. — No bill of attainder or *ex post facto* law shall be passed.

Capitation and direct taxes. — No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

Taxation on exports — commercial regulations. — No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.

Appropriations of public money — accounts. — No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Titles of nobility — presents, etc., to officers. — No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall,

without the consent of the Congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince or foreign State.

SEC. 10. No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

OF THE EXECUTIVE.

SECTION 1. President and Vice-President—term of office, election of. — The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same time, be elected as follows:—

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such a number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President, and if no person have a majority, then from the five highest on the list, the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members, from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.]

Time of choosing electors. — The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

President's qualifications. — No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Vacancy in office of President. — In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Oath of. — Before he enter on the execution of his office, he shall take the following oath or affirmation:

“ I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States.”

SEC. 2. Powers and duties of President. — The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may, by law, vest the appointment of such

inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

Vacancies in office. — The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

SEC. 3. Powers and duties of President continued. — He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he may think proper; he shall receive ambassadors and other public ministers; he shall take care that the law be faithfully executed, and shall commission all the officers of the United States.

SEC. 4. Conviction of treason, etc. — The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

OF THE JUDICIARY.

SECTION 1. Judicial power — judges — compensation — tenure of office. — The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SEC. 2. Judicial power — extends to what — Supreme Court, jurisdiction of. — The judicial power shall extend to all cases, in law and equity, arising under this Constitu-

tion, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as [the Congress shall] make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and each trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SEC. 3. Treason against the United States. — Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV.

MISCELLANEOUS PROVISIONS.

SECTION 1. Records and judicial proceedings of sister States. — Full faith and credit shall be given in each State to

the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Sec. 2. Privileges and immunities of citizens of the several States. — The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Fugitives from justice. — A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

Fugitives from service or labor. — No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Sec. 3. Admission of New States. — New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.

Government of United States — territory and property. — The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

Sec. 4. Guaranty to each State of a republican form of government. — The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature or of the executive (when the Legislature cannot be convened) against domestic violence.

ARTICLE V.

Amendments to Constitution. — The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: *Provided*, That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

Debts prior to adoption of Constitution. — All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation.

Supreme law of the land. — This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Oath to support Constitution of United States — not religious test for United States office. — The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States,

shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

Ratification of Constitution. — The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America, the twelfth. In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON, *President.*

ATTEST: WILLIAM JACKSON, *Secretary.*

AMENDMENTS TO THE CONSTITUTION,

**PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF
THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF
THE ORIGINAL CONSTITUTION.**

ARTICLE I.

Religious liberty—freedom of speech—right of petition. — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

Right to bear arms. — A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

Quartering of soldiers. — No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner prescribed by law.

ARTICLE IV.

Unreasonable searches, seizures, etc., prohibited. — The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon

probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

Rights of persons accused of crime — right of property, etc. — No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

Criminal prosecutions — speedy trial, etc. — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII.

Trial by jury in civil actions. — In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

ARTICLE VIII.

Excessive fines, etc., prohibited. — Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ARTICLE IX.

Rights retained by the people. — The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

Powers reserved to the State or people. — The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

Judicial power—limitation on. — The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

(Proposed March 5, 1794, declared ratified January 8, 1798.)

ARTICLE XII.

Election of President and Vice-President. — The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all per-

sons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate; the president of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest number not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

(Proposed December 12, 1803, declared ratified September 25, 1804.)

ARTICLE XIII.

SECTION 1. Slavery prohibited. — Neither slavery nor involuntary servitude, except as a punishment for crime whereof

the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SEC. 2. Enforcement of prohibition. — Congress shall have power to enforce this article by appropriate legislation.

(Amendment proposed February 1, 1865, declared ratified December 18, 1865.)

ARTICLE XIV.

SECTION 1. Citizenship — rights of citizens — due process of law and equal protection of the laws. — All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Apportionment of representatives. — Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. Disqualification to hold office. — No person shall be a Senator or Representative in Congress, or elector of President or Vice-President, or hold any office, civil or mili-

tary, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. Public debt. — The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Amendment proposed June 16, 1866; declared ratified July 28, 1868.)

ARTICLE XV.

SECTION 1. Elective Franchise. — The rights of citizens of the United States to vote shall not be denied or abridged by the United States, or any State, on account of race or color, or previous condition of servitude.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

(Amendment proposed February 27, 1869; declared ratified March 30, 1870.)

LAW TERMS AND MAXIMS.

LAW TERMS AND MAXIMS.

A.

A fortiori. By so much the stronger; by a more powerful reason.

A mensa et thero. "From bed and board." A divorce between husband and wife which does not make the marriage void *ab initio*, or from the beginning.

A prendre. To take; to seize.

A priori. From the former.

A verbis legis non est recedendum. From the words of the law there should be no departure.

A vinculo matrimonii. From the bond of marriage.

Ab initio. From the beginning.

Ab origine. From the beginning.

Absoluta sententia expositore non indiget. An absolute, unqualified sentence, or proposition, needs no expositor.

Actio accrevit. An action has accrued.

Actio personalis moritur cum persona. A personal action dies with the person.

Actor sequitur forum rei. The plaintiff must follow the forum of the thing in dispute.

Actus curiæ neminem gravabit. An act of the court shall prejudice no man.

Actus Dei neminem facit injuriam. The act of God does wrong to no one — i. e., no one is responsible in damages for inevitable accidents.

Ad finem litis. To the conclusion of the suit.

Ad idem. "To the same." To the like intent.

Ad infinitum. "To eternity." To the utmost.

Ad inquirendum. To make inquiry.

Ad libitum. At pleasure; at will.

Ad litem. To (or in) the suit (or controversy).

Ad sectam. At the suit of.

Administrator de son tort. Administrator in his own wrong.

Æquitas agit in personam. Equity acts upon the person.

Æquitas sequitur legem. Equity follows the law.

Affectio tua nomen imponit operi tuo. Your motive gives a name to your act.

Affirmantis est probatio. He who affirms must prove.

Alias ca. sa. Another writ to take (the person), to make satisfaction.

Alias scire facias. "That you again cause to be informed."

A second writ of scire facias.

Alibi. "In another place."

Alibi natus. Born in another place.

Aliud est celare, aliud tacere. To conceal is one thing, to be silent another.

Allegari non debuit quod probatum non relevat. That ought not to be alleged which, if proved, would not be relevant.

Ancient demesne. An ancient inheritance.

Animo furandi. With intent to steal.

Animo lucrandi. With intention to gain a profit.

Animalia feræ naturæ. Animals of a wild nature.

Animus hominis est anima scripti. The intention of the party is the soul of the instrument.

Apices juris non sunt jura. Legal niceties are not laws.

Assumpsit. He undertook (or promised).

Assumpsit pro rata. He undertook agreeably to the proportion.

Autre droit. Another's right.

B.

Banco. "In bench." As "dies in banco," or days in which the court sits.

Bancus ruptus. "A broken bank." From which the word bankrupt.

Baron et feme. The husband and wife.

Benignius leges interpretandæ sunt quo voluntas carum conservetur. Laws are to be more favorably interpreted, that their intent may be preserved.

Billa vera. A true bill.

Bona fide. In good faith.

Bona fides exigit ut quod convenit fiat. Good faith demands that what is agreed upon shall be done.

Bonus. A consideration given for what is received; a premium paid to a grantor or vendor.

C.

Capias. "You may take." A writ authorizing the defendant's arrest.

Capias ad computandum. That you take (defendant) to make account.

Capias ad respondendum. That you take (defendant) to make answer.

Capias ad satisfaciendum. That you take (defendant) to make satisfaction.

Capias ad valentiam. That you take to the value.

Capias in withernam. That you take a reprisal.

Capias pro fine. That you take for a fine.

Causa causans. The moving cause.

Causa impotentiae. On account of impotence.

Causa causæ est causa causati. The cause of a cause is the cause of the effect.

Causa mortis. On account of death; in prospect of death.

Casus foederis. A cause which comes within the terms of a compact.

Caveat. That he beware; a warning.

Caveat emptor. Let the purchaser beware.

Caveat venditor. Let the seller beware.

Cepi corpus. I have taken the body.

Certiorari. "To be certified of; to be informed of." A writ directing the proceedings or record of a cause to be brought before a superior court.

Cessante causa, cessat effectus. The cause ceasing, the effect must cease.

Cestui que trust. A person for whose use another is seized of lands, etc.

Cestui que use. A person for whose use land, etc., is given or granted.

Cestui que vie. A person for whose life a gift or grant is made.

Chose in action. A thing in action.

Clausum fregit. He broke the close or field.

Commodum ex injuria sua non habere debet. No man ought to derive any benefit of his own wrong.

Compensatio criminis. A compensation for crime.

Compos mentis. "Of sound mind." A man in such a state of mind as to be qualified legally to sign a will or deed, etc.

Contra bonos mores. Against good morals.

Contractus legem ex conventionione accipiunt. The agreement of the parties makes the law of the contract.

Conventio vincit legem. The agreement of the parties overcomes or prevails against the law.

Corpora cepi. I have taken the bodies.

Covert. Married.

Crim. con. Illicit connection (adultery).

Cuiuslibet in arte sua perito est credendum. Credence should be given to one skilled in his peculiar art.

Cujus est solum ejus usque ad cœlum. He who owns the soil owns it up to the sky.

Culpa lata dolo æquiparatur. Gross neglect is equivalent to fraud.

Currit tempus contra desides et sui juris contemptores. Time runs against the slothful and those who neglect their rights.

Cy pres. By approximation.

D.

Damage feasant. Doing damage.

Data. "Things granted." We must proceed on certain "data"—that is, on matters previously admitted to be correct.

Datum. A thing granted; a point fixed upon; a first principle.

De bene esse. Conditionally.

De bonis non. Of goods not (administered).

De bonis non administrandis. Of goods unadministered.

De die in diem. From day to day.

De facto. Of the deed; in fact.

De gratia. As a matter of grace or favor.

De jura judices, de facto juratores, respondent. The judges answer concerning the law, the jury concerning the facts.

De jure—de facto. "From the law; from the fact." Sometimes an offender is guilty the moment the wrong is committed, then he may be said to be guilty "de facto." In other cases he is not guilty until he be convicted by law; then he is guilty "de jure."

De minimis non curat lex. The law does not notice trifling matters.

De novo. Anew; afresh.

De præsentī. Of the present time.

De son don. Of his gift.

De son tort. "Of his own wrong." This was part of a plea very similar to *son assault demesne*.

Debet et detinet. He owes and detains.

Debet quis juri subiacere ubi delinquit. Every one ought to be subject to the law of the place where he offends.

Debile fundamentum, fallit opus. Where there is a weak foundation the work falls.

Defeasance. A conditional undertaking to annul the effect of a bond, etc.

Delegata potestas non potest delegari. A delegated authority cannot be again delegated.

Delictum. A fault, offense, or crime.

Detinet. He keeps. He detains.

Detinuit. He has detained.

Deus solus hæredem facere potest, non homo. God alone, and not man, can make an heir.

Devastavit. He wasted.

Devastavit nolens volens. He wantonly (or wickedly) committed waste.

Dicta. Sayings; remarks; observations.

Dies dominicus non est juridicus. Sunday is not a day in law.

Discretio est discernere per legem quid sit justum.

Discretion is to discern through law what is right.

Distringas. That you distrain.

Divinatio non interpretatio est, quæ omnino recedit a litera. It is a guess, not interpretation, which altogether departs from the letter.

Dolus circuitu non purgatur. Fraud is not purged by circuitry.

Domesday, or Domesday Book. A book showing the tenures, etc., of most of the lands in England in the time of William the Conqueror.

Dominium non potest esse in pendent. The right of property cannot be in abeyance.

Donatio. A gift; a donation.

Dormiunt aliquando leges, nunquam moriuntur. The laws sometimes sleep, but never die.

Droit des gens. The law of the nations.

Duces tecum. "That you bring with you." A subpoena, so called, when the person is commanded to produce books, papers, etc., to the court and jury.

E.

E converso. On the other hand; on the contrary.

Eat sine die. Let him go without day (or be discharged).

Elegit. "He has chosen." A judicial writ directed to the sheriff, empowering him to seize one moiety of the defendant's lands for damages recovered.

En ventre sa mere. In the womb.

Enciente. Pregnant.

Enumeratio unius est exclusio alterius. Specification of one thing is an exclusion of the rest.

Error coram nobis. Error (lying) before us.

Error coram vobis. Error before you.

Error nominis nunquam nocet, si de identitate rei constat. Mistake in the name never injures, if there is no doubt as to the identity of the thing.

Error scribentis nocere non debet. An error made by a clerk ought not to injure; a clerical error may be corrected.

Eruditus in lege. "Learned in the law;" a counsel.

Escrow. A deed or writing left with another, to be delivered on the performance of something specified.

Estoppel. "A stop;" a preventive plea.

Estovers. Wood cut from a farm by the tenant which, by the common law, he has a right to use on the estate for necessary purposes.

Et ad huc detinet. And he still detains.

Et non alibi. And in no other place.

Ex equo et bono. In equity and good conscience.

Ex contractu. By way of agreement.

Ex curia. Out of court.

Ex delicto. By (or from) a fault or offense.

Ex dolo malo non oritur actio. A right of action cannot arise out of fraud.

Ex facto. From (or by) the deed.

Ex justa causa. For a good reason (or cause).

Ex lege. An outlaw.

Ex nudo pacto non oritur actio. No action arises on a contract without a consideration.

Ex officio. Officially; by virtue of the office.

Ex parte materna. On the part of the mother.

Ex parte paterna. On the part of the father.

- Ex parte querentis.** On the part of the plaintiff.
- Ex post facto.** From (or by) an after act.
- Ex relatione.** "By (or from) relation." Sometimes the words mean "by the information."
- Ex tempore.** Off hand (without delay or premeditation.)
- Ex tota materia emergat resolutio.** The construction or explanation should arise out of the whole subject-matter.
- Ex visitatione Dei.** From the visitation of God.
- Exceptio probat regulam de rebus non exceptis.** An exception proves the rule concerning things not excepted.
- Executor de son tort.** "An executor of his own wrong;" one who acts illegally in the office.
- Exoneretur nunc pro tunc.** Let him (or it) be now discharged, instead of at some past time.
- Expressa nocent, non expressa non nocent.** Things expressed may be prejudicial; things not expressed are not.

F.

- Fac simile.** Do the like; a close imitation.
- Facias.** That you do (or cause to be done).
- Factum negantis nulla probatio.** No proof if incumbent on him who denies a fact.
- Factum unius alteri nocere non debet.** The deed of one should not hurt another.
- Falsa demonstratio non nocet.** A false description does not vitiate.
- Falsare curiam.** To deceive the court.
- Falsus in uno, falsus in omnibus.** False in one thing, false in everything.
- Felo de se.** A suicide; a self-murderer.
- Feme covert.** A married woman.
- Feme sole.** An unmarried woman.
- Feme sole sub modo.** A single woman to a certain extent.
- Feoffare.** To enfeoff or grant in fee.
- Feudum.** A fee; land held in fee simple.
- Fiat.** Let it be done.

Fiat justitia ruat cœlum. Let justice be done though the heavens should fall.

Fictio legis neminem lædit. A fiction of law injures no one.

Fief. "A fee." What we call a fee is, in other countries, the contrary to chattels. In Germany certain districts or territories are called "fiefs," where there are fiefs of the Empire.

Fieri. To be made or done.

Fieri facias. That you cause to be made or done, or levied.

A writ of execution, so-called.

Flotsam. Goods floating on the sea.

Forma legalis. A legal form.

Forum. A court or place of justice.

Frank-almoign. A free gift.

Fraus est celare fraudem. It is fraud to conceal fraud.

Fraus est odiosa et non præsumenda. Fraud is odious and not to be presumed.

Furiosi nulla voluntas est. A madman has no will.

Furiosus solo furore punitur. A madman is punished by his madness alone.

G.

Gavel-kind. A peculiar tenure of land.

Generale nihil certum implicat. A general expression implies nothing certain.

Guardian ad litem. A guardian in the suit.

H.

Habeas corpora. That you have the bodies.

Habeas corpus. "That you have the body." The great writ of the people's liberty.

Habeas corpus ad respondendum. That you have the body to answer.

Habeas corpus ad satisfaciendum. That you have the body to make satisfaction.

Habeas corpus ad testificandum. That you have the body to give evidence.

Habeas corpus cum causa. That you have the body with the cause (why he is arrested).

Habendum et tenendum. To have and to hold.

Habere facias possessionem. That you cause to take possession.

Habere facias seisinam. That you cause to have the possession.

Hæredum appellatione veniunt hæredes hæredum in infinitum. By the title of heirs come the heirs of heirs to infinity.

Hæres hæredis mei est meus hæres. The heir of my heir is my heir.

Hominum causa just constitutum est. Law is established for the benefit of man.

I.

Id certum est quod certum reddi potest. That is certain which may be rendered certain.

Idem dies. The same day; a like day.

Idem est facere, et nolle prohibere cum possis. It is the same thing to do a thing as not to prohibit it when in your power.

Ignoramus. "We are ignorant." A word written on a bill of indictment when the evidence is insufficient to put the accused on his trial.

Ignorantia facti excusat, ignorantia juris non excusat. Ignorance of facts excuses; ignorance of law does not excuse.

Ignorantia legis neminem excusat. Ignorance of law excuses no one.

Imparlance. A time granted by the court for the defendant to plead.

Impossibillium nulla obligatio est. There is no obligation to perform impossible things.

Impotentia excusat legem. Impossibility is an excuse in the law.

In articulo mortis. At the point of death.

- In autre droit.** In right of another.
- In banco regis.** In the King's Bench.
- In capite.** In chief. Lands held "in capite" are those held of the chief lord of the fee.
- In colloquio.** In a discourse.
- In criminalibus, probationes debent esse luce clariores.** In criminal cases the proofs ought to be clearer than the light.
- In delicto.** In an offense, or in default.
- In dominio suo.** In his demesne or lordship.
- In dorso.** On the back.
- In dubiis.** In doubtful cases.
- In esse.** In being.
- In extenso.** At large; to the extent.
- In extremis.** In the last moments; near death.
- In infinitum.** To infinity; time without end.
- In invitum.** Against an unwilling party, by operation of law.
- In jure non remota causa, sed proxima spectatur.**
In law the proximate, and not the remote, cause is to be looked to.
- In loco parentum.** In the place of the parents.
- In maleficiis voluntas spectatur non exitus.** In offenses the intention is regarded, not the event.
- In mortua manu.** In mortmain; in a dead hand or possession.
- In omnibus obligationibus, in quibus dies non ponitur, presenti die debetur.** In all obligations, when no time is fixed for the payment, the thing is due immediately.
- In pais.** In the country.
- In pari delicto.** In a like offense (or crime).
- In pari delicto melior est conditio possidentis.** When the parties are equally in the wrong, the condition of the possessor is better.
- In presenti.** At the present time.
- In proprio jure.** In (his) proper (or peculiar) right.

In propria persona. In his own person; in personal attendance.

In re. In the matter of.

In re dubia magis inficiatio quam affirmatio intelligenda. In a doubtful matter the negative is to be understood rather than the affirmative.

In rem. To or against the property; to the point.

In rerum natura. In the nature (or order) of things.

In stirpes. To the stock or lineage.

In suo jure. In his own right.

In terrorem. By way of terror (or warning).

In toto. In the whole; altogether; entirely.

In transitu. "In the passage." Merchandise is said to be "in transitu" while on its way to the consignee.

Invadio. In pledge.

In ventre sa mere. In its mother's womb.

Incipitur. It is begun.

Infeudare. To enfeoff; grant in fee.

Injuria non excusat injuriam. A wrong does not excuse a wrong.

Injuria propria non cadet in beneficium facientis. No one shall profit by his own wrong.

Inscriptum. An indorsement.

Intentio mea imponit nomen operi meo. My intent gives a name to my act.

Inter moenia. Within the walls; within the domicile.

Inter nos. Between ourselves—that is (inter nos), to keep a secret.

Interpretatio fienda est ut res magis valeat quam pereat. Such a construction is to be made that the subject may have an effect rather than none.

Interregnum. A space between two reigns.

Interregnum quare clausum fregit? In the meantime, why did he break the close?

Ipsa facto. By the fact itself; positively.

Ipsa jure. By the law itself, or by that right.

Ira furor brevis est. Anger is a short insanity.
Italex scripta. So the law is written.

J.

Jetsam. Goods thrown into the sea.

Judex sequitatem semper spectare debet. A judge ought always to regard equity.

Judici officium suum excedenti non paretur. To a judge who exceeds his office or jurisdiction no obedience is due.

Judicis est jus dicere non dare. It is the duty of a judge to declare the law, not enact it.

Judicia posteriora sunt in lege fortiora. The later decisions are stronger in law.

Jura in re. Rights in the matter or thing.

Jura personarum. The rights of persons.

Jura publica ante ferenda privatis. Public rights are to be preferred to private.

Jura rerum. The rights of things.

Juratores sunt iudices facti. Jurors are the judges of the facts.

Jure divino. By right divine.

Jure gentium. By the law of nations.

Jure humano. By human law (or right).

Jure mariti. In right of the husband.

Jure naturæ. By the law of nature.

Jure uxoris. In right of the wife.

Jus ad rem. A right to the property.

Jus civile. The civil (or municipal) law.

Jus ex injuria non oritur. A right cannot arise from a wrong.

Jus in re. The right in the property.

Jus suum. His own right.

Justitia non est neganda, non differenda. Justice is not to be denied nor delayed.

L.

Laches. Neglect; supineness.

Lata culpa dolo equiparatur. Gross negligence is equal to fraud.

Leges posteriores priores contrarias abrogant. Subsequent laws repeal prior conflicting ones.

Levari facias. That you cause to be levied.

Levari facias de bonis. That you cause to be levied of the goods.

Lex dilationes semper exhorret. The law always abhors delay.

Lex est dictamen rationis. Law is the dictate of reason.

Lex est norma recti. Law is a rule of right.

Lex fori. The law of the court.

Lex neminum cogit ad vana seu inutilia peragenda.

The law forces no one to do vain or useless things.

Lex nemini facit injuriam. The law does wrong to no one.

Lex non scripta. The unwritten or common law; that which has been received from time immemorial by tradition.

Lex scripta. The written or statute law.

Lex semper dabit remedium. The law will always give a remedy.

Lex semper intendit quod convenit rationi. The law always intends what is agreeable to reason.

Lex talionis. The law of requital in kind. "An eye for an eye," etc., as in the Mosaic law.

Lex uno ore omnes alloquitur. The law speaks to all with one mouth.

Libelli famosi. Libels; infamous writings.

Libellus sine scriptis. An unwritten libel.

Liber homo. A free man.

Liberari facias. That you cause to be delivered.

Loco parentis. In the place of the parent.

Locus contractus regit actum. The place of the contract governs the act.

Locus penitentiae. A place of repentance; a power of drawing back from a contract or bargain before any act is done to confirm it in law.

L. S. — Locus sigilli. The place of the seal.

Longa patientia trahitur ad consensum. Long sufferance is construed as consent.

Longa possessio est pacis jus. Long possession is the law of peace.

M.

Magna Charta. The great Charter. The bulwark of English liberty.

Magna culpa dolus est. Great neglect is equivalent to fraud.

Mahemium est homicidium inchoatum. Mayhem is incipient homicide.

Majori summæ minor inest. The lesser is included in the greater.

Mala fide. In bad faith; with intent to deceive.

Mala prohibita. Wrongs forbidden (by common law).

Malfeasance. Doing wrong; a bad act.

Malo animo. With bad intentions.

Malum in se. Bad in itself; wrong in its own nature.

Malum prohibitum. A prohibited offense.

Mandamus. "We command." A peremptory writ, issued for many purposes.

Manu forti. With a strong hand; by violence.

Matrimonium subsequens tollit peccatum præcedens.

A subsequent marriage cures preceding criminality.

Mellior est causa possidentis. The cause of the possessor is preferable.

Mellior est conditio defendentis. The cause of the defendant is the better.

Mesne. "Middle; intervening." The middle between two extremes, and that either in time or dignity.

Misfeasance. A misdeed.

Modo et forma. In manner and form.

Modica circumstantia facti jus mutat. A small circumstance attending an act may change the law.

Mortmain — Manus mortua. A dead hand or an unchangeable possession.

Mutatis mutandis. The necessary changes.

N.

Narratio, often abbreviated **Narr'**. A declaration; a count.

Naufrage. Shipwreck.

Nemo contra factum suum venire potest. No man can contradict his own deed.

Nemo debet rem suam sine facto aut defectu suo amittere. No one should lose his property without his act or negligence.

Nemo est hæres viventis. No one is an heir to the living.

Nemo ex proprio dolo consequitur actionem. No one acquires a right of action from his own wrong.

Nemo plus juris alienum transferre potest, quam ipse habet. One cannot transfer to another a larger right than he himself has.

Nemo potest facere per obliquum quod non potest facere per directum. No one can do that indirectly which cannot be done directly.

Nemo tenetur se ipsum accusare. No one is bound to accuse himself.

Nihil debet. He is not indebted.

Nihil dicit. He says nothing.

Nihil habet forum ex scena. The court has nothing to do with what is not before it.

Nihil quod est contra rationem est licitum. Nothing against reason is lawful.

Nil debet. "He owes nothing." The usual plea in an act of debt.

Nil debet in assumpsit. He is not indebted in (the action of) *assumpsit*.

Nil dicit. He says nothing.

Nolle prosequi. "To be unwilling to proceed." Generally used in criminal cases when further proceedings are discontinued.

Non cepit. He did not take.

Non compos mentis. Not of sound mind; in a delirium of lunacy.

Non damnificatus. Not damaged; not injured.

Non deberet alii nocere, quod inter alios actum esset.

No one ought to be injured by that which has taken place between other parties.

Non debet. He does not owe.

Non deceptitur qui scit se decipi. He is not deceived who knows himself to be deceived.

Non differunt quæ concordant re, tametsi non in verbis iisdem. Those things which agree in substance, though not in the same words, do not differ.

Non est inventus. "He is not found." The return made by a sheriff when the defendant is not found in his county.

Non est regula quin fallat. There is no rule but what may fail.

Non omne damnum inducit injuriam. Not every loss produces an injury.

Non pros'. He will not prosecute.

Non prosequitur. He does not proceed; he is non-suited.

Non refert an quis assensum suum præfert verbis, an rebus ipsis et factis. It is immaterial whether a man gives his assent by words or by acts and deeds.

Non refert quid notum sit judici, si notum non sit in forma judicii. It matters not what is known to the judge, if it is not known to him judicially.

Non refert verbis an factis fit revocatio. It matters not whether a revocation be by words or by acts.

Non sum informatus. I am not informed; I am ignorant.

Non tenuit. He did not occupy (or hold).

Nonfeasance. Non-performance.

Nuda pactio obligationem non parit. A naked promise does not create an obligation.

Nudum pactum. A bare (or naked) contract; one not binding in law.

Nul assets ultra. No further effects.

Nul tiel corporation. No such corporation.

Nul tiel record. "No such record." This is a part of the plaintiff's rejoinder, that there is no such record, where the defendant alleges matter of record in bar of the plaintiff's action.

Nul tort. "No wrong." A plea in a real action that no wrong was done, and is a species of the general issue.

Nulla bona. No effects.

Nullus videtur dolo facere qui suo jure utitur. No man is to be esteemed a wrong-doer who avails himself of his legal right.

Nunc pro tunc. "Now for that time." These words are frequently used, in legal or equitable proceedings, where something is permitted to be done "eo instanti" which should have been performed some time before.

Nunquam res humanæ prospere succedunt ubi negliguntur divinæ. Human things never prosper when divine things are neglected.

O.

Omne actum ab intentione agentis est judicandum.

Every act is to be estimated by the intention of the doer.

Omne sacramentum debet esse de certa scientia.

Every oath ought to be founded on certain knowledge.

Omnes licentiam habere his quæ pro se indulata sunt, renunclare. All shall have liberty to renounce those things which have been established in their favor.

Omnia præsumuntur rite et solemniter esse acta. All things are presumed to have been rightly and regularly done.

Omnis exceptio est ipsa quoque regula. An exception is in itself also a rule.

Omnis ratihabitio retro trahitur et mandato sequiparatur. Every subsequent ratification has a retrospective effect, and is equivalent to a prior command.

Opinio quæ favet testamento est tenenda. That opinion is followed which favors the will.

Optima enim est legis interpretæ consuetudo. Usage is the best interpreter of law.

Origo rei inspicere debet. The origin of a thing ought to be inquired into.

Ouster. A dispossession.

Overt. Open; public.

Owelty. The difference which is paid or received by one coparcener to another for the purposes of equalizing a partition.

Oyer et terminer. To hear and determine.

P.

Parole. Verbally.

Parum proficit scire quid fieri debet, si non cognoscas quomodo sit facturum. It avails little to know what ought to be done if you do not know how it is to be done.

Pendente lite. Whilst the contest (or suit) is depending.

Per annum — Per diem. By the year; by the day.

Per autre vie. For the life of another.

Per capita. "By the heads or polls;" a division, share and share alike.

Per duellum. By single combat.

Per se. By himself, herself, or itself.

Per stirpes. By stock; by lineage.

Per totam curiam. By the whole court.

Per verba de futuro. By words of future acceptance.

Per verba præsentis. By words of the present time.

Per viam eleemosynæ. By way of charity or alms.

Pendente lite nihil innovetur. During litigation nothing should be changed.

Periculum rei venditæ, nondum traditæ, est emptoris.
The purchaser runs the risk of the loss of the thing sold, though not delivered.

Plena fides. Full credit.

Pluries. "Very often." Also the name of a third writ, after two have issued against a defendant.

Plus peccat auctor quam actor. The instigator of a crime is worse than he who perpetrates it.

Pone. "Put." The name of a writ or process in replevin.

Ponderantur testes non numerantur. Witnesses are weighed, not counted.

Posse comitatus. "The power of the county." Which the sheriff is authorized to call out whenever an opposition is made to his writ or to the execution of justice.

Post diem. After the day.

Post mortem. After the death.

Post nati. After-born.

Post obit. After the death.

Post terminum. After the term.

Postea. "Afterwards." The name given to the indorsement of the verdict made on the record.

Potentia non est nisi ad bonum. Power is not conferred but for the public good.

Potest quis renunciare pro se, et suis, jus quod pro se introductum est. A man may relinquish, for himself and those claiming under him, a right which was introduced for his own benefit.

Præcipe. Command.

Præcipe in capite. A writ of right, so-called.

Præsumptio violenta, plena probatio. Violent presumption is full proof.

Prima facie. On the first view or appearance of the business.

Prochein ami. The nearest friend.

Pro rata. According to the rate, proportion, or allowance.

Pro tanto. For so much.

Prohibetur ne quis faciat in suo quod nocere possit alieno. It is prohibited to do on one's own property that which may injure another's.

Pueri sunt de sanguine parentum, sed pater et mater non sunt de sanguine puerorum. Children are of the blood of their parents, but the father and mother are not of the blood of their children.

Pur autre vie. For the life of another.

Q.

Quæ in curia acta sunt rite agi præsumuntur. Whatever is done in court is presumed to be rightly done.

Quæcunque intra rationem legis inveniuntur, intra legem ipsam esse judicantur. Whatever appears within the reason of the law is considered within the law itself.

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud. When anything is commanded, everything by which it can be accomplished is also commanded.

Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest. When the law gives anything it gives the means of obtaining it.

Quando verba et mens congruunt, non est interpretationi locus. When the words and the mind agree there is no place for interpretation.

Quantum damnificatus. Amount of damage.

Quantum valebat. As much as it was worth.

Quare clausum fregit? Wherefore (or why) did he break the close?

Quasi ex contractu. In nature of a contract.

Quasi ex delicto. As of an offense (or crime).

Qui facit per alium facit per se. He who acts by or through another, acts himself.

Qui hæret in litera, hæret in cortice. He who adheres to the letter adheres to the bark.

Qui jure suo utitur, nemini facit injuriam. He who uses his legal right harms no one.

Quid pro quo. A mutual consideration.

Quo animo. With what intent.

Quo warranto. "By what authority." The name of a writ against a person who has usurped a franchise or office.

Quoad hoc. With respect to this.

Quod ab initio non valet, in tractu temporis non convalescet. What was not good in the beginning cannot be rendered good by time.

Quod alias non fuit licitum necessitas licitum facit. Necessity makes that lawful which otherwise were unlawful.

Quod detinuit. Which he (or she) detains.

Quod initio vitiosum est non potest tractu temporis convalescere. Time cannot render valid an act void in its origin.

Quod quis ex culpa sua damnum sentit non intelligitur damnum sentire. He who suffers damage by his own fault is not held to suffer damage.

Quod quis sciens indebitum dedit hac mente, ut postea repeteret, repetere non potest. What one has paid knowing it not to be due, with the intention of recovering it back, he cannot recover back.

Quousque debitum satisfactum fuerit. Until the debt be satisfied.

R.

Ratio legis est anima legis. The reason of the law is the soul of the law.

Rectus in curia. "Untainted in court;" with clean hands.

Reddendum. To pay; to yield; to render. The reservation of rent, etc., in a deed.

Registrum. A registry; a place for depositing wills, deeds, etc.

Remittitur. To restore (or send back).

Replegiari facias. That you cause to be replevied.

Res inter alios judicatæ nullum aliis præjudicium faciant. Matters adjudged in a cause do not prejudice those who were not parties to it.

Res integra. An entire (new or untouched) matter.

Res judicata pro veritate accipitur. A thing adjudged must be taken for truth.

Rescous. A rescue.

Residuum. "The remainder." Frequently applied to that part of the testator's estate not especially disposed of.

Respondere non debet. He ought not to answer.

Retorna brevium. The return of writs.

Retorno habendo. That a return be had.

Reversetur. Let it be reversed.

Rex non potest peccare. The king can do no wrong.

Rex nunquam moritur. The king never dies.

S.

Sans issue. Without children.

Scienter. Knowingly; willfully.

Scientia utriusque par pares contrahentes facit.
Equal knowledge on both sides makes the contracting parties equal.

Scintilla. A tittle; a spark.

Scire facias. That you make known. This is the name of a writ, for many purposes, commanding the defendant to show cause why a certain specific thing should not issue on an old judgment, etc.

Scire fieri. To be informed.

Scribere est agere. To write is to act.

Secta. A suit; litigation. Also, the pledges produced that the plaintiff should prosecute his claim.

Sed per curiam. But by the court.

Semble. It seems.

Semper qui non prohibet pro se intervenire, mandare creditur. He who does not prohibit the intervention of another in his behalf is supposed to authorize it.

Sequestrari facias. That you cause to be sequestered.

Si judicas, cognosce. If you judge, understand.

Sine die. "Without day." As, the court adjourned "sine die" — no day being mentioned for sitting again.

Sine qua non. An indispensable condition.

Son assault. His own assault.

Sponsalia. Marriage contracts.

Sponsio judicialis. A judicial agreement.

ss. (Scilicet.) To wit; namely.

Stabit præsumptio donec probetur in contrarium. A presumption will stand good until the contrary is proved.

Stare decisis. To abide by or adhere to decided cases.

Statutum generaliter est intelligendum quando verba statuti sunt specialia, ratio autem generalis. When the words of a statute are special, but the reason of it general, it is to be understood generally.

Stirpes. The stock; lineage; race.

Stricti juris. Of strict right (or law).

Sub finem. Under a penalty.

Sub modo. Under a condition; within bounds.

Sub potestate viri. Under the control of the husband.

Subpoena. "Under a penalty." A writ so-called to procure the attendance of a witness.

Subpoena ad testificandum. A subpoena to give evidence.

Subpoena duces tecum. "Bring with you, under a penalty." The name of a writ by which a witness is commanded to produce something in his possession, to be given in evidence.

Subsidium justitiæ. An aid to justice.

Suggestio falsi. A suggestion (or incitement) to falsehood or wrong.

Sui generis. "Of his own kind;" not to be classed under any ordinary description.

Sui juris. Of his own right.

Supersedeas. "You may remove or set aside." A writ so called to stay proceedings.

Supra protest. An acceptance of a bill after protest.

Suppressio veri, expressio falsi. Suppression of the truth is (equivalent to) the expression of what is false.

Sur trover et conversion. Under trover and conversion.

T.

Tenendum. "To hold." That clause in a deed wherein the tenure of the land is created and limited.

Terminus. The end, limit, or boundary. Sometimes it means the stock or root to which, by reference, the future succession is to be regulated.

Terra transit cum onere. Land passes with the incumbrances.

Terre tenant. The tenant who occupies the land; he who has the actual possession.

Testari. To be witnessed.

Testatum. It is testified.

Testatum capias. That you take the person testified (or to have been proceeded against elsewhere).

Testatum fieri facias. That you cause the testified writ to be executed.

Testatum pluries. A testified process issued more than twice.

Teste. The date; the supposed issuing of process.

Testis de visu præponderat aliis. An eye-witness outweighs others.

Tort. A wrong; an injury.

Tort-feasor. A wrong-doer; a trespasser.

Traditio loqui facit chartam. Delivery makes the deed speak.

Trespass, qare clausum fregit. Trespass, wherefore he broke the close.

Trespass vi et armis, de uxore rupta et abducta. Trespass with force and arms, concerning a wife taken and carried away.

Triatio ibi semper debet fieri, ubi juratores meliorem possunt habere notitiam. Trial ought always to be had where the jury can have the best knowledge.

Tutius erratur ex parte mitiori. It is safer to err on the side of mercy.

U.

Ubi jus, ibi remedium. Where there is a right there is a remedy.

Ubi jus incertum, ibi jus nullum. Where the law is uncertain there is no law.

Ubi pugnancia inter se in testamento iuberentur, netrum ratum est. When two directions conflicting with each other are given in a will, neither is held valid.

Ubi quis delinquit ibi punietur. Let a man be punished where he commits the offense.

Ubi verba conjuncta non sunt, sufficit alterutrum esse factum. Where words are used disjunctively, it is sufficient that either one of the things enumerated be performed.

Ultra mare. Beyond sea.

Usance. Usury; interest.

V.

Vacatur. It is set aside; vacated.

Vani timoris justa excusatio non est. A frivolous fear is not a legal excuse.

Venditioni exponas. That you expose to sale.

Venire. To come.

Venire ad respondendum. To come to make answer.

Venire de novo. To come anew.

Venue. The place from which the jury come.

Verba intentioni, non e contra, debent inservire.
Words ought to be made subservient to the intent, not contrary to it.

Vi et armis. By force and arms; by unlawful means.

Via antiqua via est tuta. The old way is the safe way.

Vicarius non habet vicarium. A deputy cannot appoint a deputy.

Vice versa. On the contrary.

Vicini vicinora præsumentur scire. Neighbors are presumed to know things of the neighborhood.

Vinculo matrimonii. In the bond of wedlock.

Vis legibus est inimica. Force is inimical to the laws.

Vitium clerici nocere non debet. Clerical errors ought not to prejudice.

Viva voce. Verbally.

Voire dire. Witnesses are sometimes examined upon "voire dire" previously to their being examined in chief; this is done to ascertain whether they are interested in the cause at issue, or labor under any other incapacity which may render them incompetent to give evidence.

Volenti non fit injuria. He who consents cannot receive an injury.

Vox emissa volat, litera scripta manet. Words spoken vanish, words written remain.

TABLE OF BRITISH REGNAL YEARS.

SOVEREIGNS.	Commence- ment of Reign.	Length of Reign.	
William I.....	Oct. 24, 1066	21	Maurice.
William II.....	Sept. 26, 1087	13	
Henry I.....	Aug. 5, 1100	36	
Stephen.....	Dec. 26, 1135	19	
Henry II.....	Dec. 19, 1154	35	Glanville.
Richard I.....	Sept. 23, 1189	10	
John.....	May 27, 1199	18	
Henry III.....	Oct. 28, 1216	57	Bracton.
Edward I.....	Nov. 20, 1272	35	
Edward II.....	July 8, 1307	30	
Edward III.....	Jan. 25, 1326	51	
Richard II.....	June 23, 1377	23	Arundel.
Henry IV.....	Sept. 30, 1399	14	
Henry V.....	March 21, 1413	10	
Henry VI.....	Sept. 1, 1422	39	Fortescue.
Edward IV.....	March 4, 1461	23	Littleton.
Edward V.....	April 9, 1483	....
Richard III.....	June 26, 1483	3	
Henry VII.....	Aug. 22, 1485	24	
Henry VIII.....	April 22, 1509	38	Wolsey.
Edward VI.....	Jan. 28, 1547	7	
Mary.....	July 6, 1553	6	
Elizabeth.....	Nov. 17, 1558	45	Bacon.
James I.....	March 24, 1603	23	Coke.
Charles I.....	March 27, 1625	24	
The Commonwealth.....	Jan. 30, 1649	11	Hale.
Charles II.....	May 29, 1660	27	Clarendon.
James II.....	Feb. 16, 1685	4	Jeffreys.
William and Mary.....	Feb. 13, 1689	14	
Anne.....	March 8, 1702	13	Holt.
George I.....	Aug. 1, 1714	13	Hardwicke.
George II.....	June 11, 1727	34	Mansfield.
George III.....	Oct. 26, 1760	60	Blackstone.
George IV.....	Jan. 29, 1830	11	Eldon.
William IV.....	June 26, 1830	7	Brougham.
Victoria.....	June 20, 1837	63	Denman.
Edward VII.....	Jan. 22, 1900	....

CHIEF JUSTICES

OF THE SUPREME COURT OF THE UNITED STATES,
FROM MARCH 4TH, 1789.

John Jay, of New York, appointed by the President, with the advice and consent of the Senate, September 26th, 1789. Nominated 16th, and confirmed 19th of April, 1794, Envoy Extraordinary to England. Resigned as Chief Justice.

John Rutledge, of South Carolina, appointed July 1st, 1795, in recess of Senate, in place of Jay, resigned, and presided on the bench at the August term, 1795. Nominated 10th, and rejected by the Senate 15th, December, 1795.

William Cushing, of Massachusetts. Nomination confirmed and appointed, etc., January 27th, 1796, in place of Jay. Declined the appointment. He was then an Associate Justice.

Oliver Ellsworth, of Connecticut. Nomination confirmed and appointed, etc., March 4th, 1796, in place of Cushing, declined. Appointed Envoy Extraordinary and Minister Plenipotentiary to France, February 27th, 1799. Presided on the bench at the August term, 1799. Proceeded on his mission to France November 8d, 1799, resigning as Chief Justice.

John Jay, Governor of New York. Nomination confirmed and appointed, etc., December 19th, 1800, in place of Ellsworth, resigned. Declined the appointment.

John Marshall, Secretary of State. Nomination confirmed 27th, and appointed, etc., January 31st, 1801, in place of Jay, declined. Died in 1835.

Roger B. Taney, of Maryland. Nomination confirmed and appointed, etc., March 15th, 1836, in place of Marshall, deceased. Died in 1864.

Salmon P. Chase, of Ohio. Nomination confirmed, appointed, etc., December 6th, 1864. Died in December, 1873.

Morrison R. Waite, of Ohio. Nominated January 19th, 1874, and nomination confirmed, appointed, etc., in February, 1874. Died March 23, 1888.

Melville W. Fuller, of Illinois. Commissioned July 20th, 1888. Sworn in October 8th, 1888.

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